

COLLECTIVE MEMORY AND THE PERSISTENCE OF INJUSTICE: FROM HAWAI‘I’S PLANTATIONS TO CONGRESS—PUERTO RICANS’ CLAIMS TO MEMBERSHIP IN THE POLITY

SUSAN K. SERRANO*

At the dawn of the twentieth century—after the United States’ successful takeover of Puerto Rico, Hawai‘i, the Philippines, and Guam—burgeoning American agribusiness sought to control immigrant workers from around the world. In particular, it targeted recalcitrant Puerto Ricans organizing mass resistance to oppressive working and living conditions in Hawai‘i’s sugar cane fields.¹

White American plantation owners (many the descendants of missionaries) suppressed rebellion in part through physical force and in part by spreading damaging cultural stereotypes about the “wretchedness” and

* Director of Educational Development, Ka Huli Ao Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, University of Hawai‘i at Mānoa. J.D. 1998, William S. Richardson School of Law, University of Hawai‘i at Mānoa. I am grateful to Eric Yamamoto for his invaluable guidance and inspiration, and for his extraordinary ideas and comments on this article. Many thanks also to Kapua Sproat, Justin Levinson, Dina Shek, Ediberto Román, and Kevin Johnson for reading and commenting on drafts of this article. I also appreciate the significant contributions of law students and Equal Justice Society Scholar Advocates Michele Sonen and Troy Andrade, and the editing assistance of Ka Huli Ao Post-Juris Doctor Research and Scholarship Fellow Nathaniel Noda.

¹ See *They Are a Wretched Lot*, PAC. COM. ADVERTISER, Dec. 11, 1900, at 1 [hereinafter *Wretched Lot*]; *Hard Times for “Vags”*: Jailer Henry Gives Them a Tough Place, HAWAIIAN STAR, Oct. 19, 1901, at 5; *Porto Rican Petition: Queer Document in from Kauai Laborers*, PAC. COM. ADVERTISER, Oct. 27, 1904, at 3; *Few Puerto Ricans are Loafing Now*, PAC. COM. ADVERTISER, Dec. 15, 1904, at 1.

“deviance” of the Puerto Rican people.² Consider this 1901 image printed in the *Pacific Commercial Advertiser*, an American puppet newspaper owned and published by the leader of the Hawaiian nation’s overthrow.³ On the front page, a menacing masked man stands defiantly on a dusty road, armed with a pistol in one hand and a knife in the other.⁴ The caption above: “A Growing Rural Industry.” The caption below: “Is he a Porto Rican?”⁵

The crucial consequence of the sugar planters’ negative characterization of Puerto Ricans in Hawai‘i was not only social control on the sugar plantations but also the legitimization of Puerto Rican exclusion from rights of citizenship, and in particular, the right to a political voice through the vote. Indeed, for the powerful white plantation oligarchy, the newly arrived Puerto Rican laborers were easy pawns: despite the United States’ annexation of Puerto Rico in 1898, Puerto Ricans were deprived of U.S. citizenship and denied the right to vote.⁶

The territorial-controlled racialized stereotypes of Puerto Ricans had amazing staying power. By the time the Puerto Rican diaspora spread to major U.S. cities, racialization—grown partly out of Hawai‘i’s cane fields—was set. Alongside pervasive stereotypes spread throughout the

² See Norma Carr, *Image: The Puerto Rican in Hawaii*, in IMAGES AND IDENTITIES: THE PUERTO RICAN IN TWO WORLD CONTEXTS 100–03 (Asela Rodríguez de Laguna ed., 1987) (chronicling sugar planters’ stereotypes of Puerto Ricans in Hawai‘i) [hereinafter Carr, *Image*].

Norma Carr has produced extraordinary materials on Puerto Ricans in Hawai‘i through the coalescence of primary documents and interdisciplinary sources. Many of the original sources cited in this article were first referenced in Carr’s work.

³ PAC. COM. ADVERTISER, Sept. 4, 1901, at 1. Lorrin Thurston, a descendant of American missionaries, owned and published the *Pacific Commercial Advertiser* and was a board member of the powerful Hawai‘i Sugar Planters Association. Carr, *Image*, *supra* note 2, at 98. Thurston also led the Committee of Safety, a group formed by American and European businessmen to overthrow the Hawaiian monarchy and to assure Hawai‘i’s annexation to the United States. See JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? 157–63 (2008); GAVAN DAWES, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 272–75 (1968); HAUNANI KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII 17 (1993).

⁴ PAC. COM. ADVERTISER, Sept. 4, 1901, at 1.

⁵ *Id.* The U.S. government misspelled Puerto Rico as “Porto Rico” for over thirty years—from 1898 to 1932. See José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 392 (1978) [hereinafter Cabranes, *Citizenship*]. The misspelling was changed by joint resolution on May 17, 1932. See S.J. Res. 36, 72d Cong. (1932).

⁶ See Treaty of Paris, U.S.-Spain, art. 9, Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris]; An Act Temporarily to Provide Revenues and Civil Government for Porto Rico, and for Other Purposes (Foraker Act), 31 Stat. 77 (Apr. 12, 1900); Cabranes, *Citizenship*, *supra* note 5, at 395 (“[T]he issue that remained [in 1900] was whether racially and culturally distinct peoples brought under American sovereignty without the promise of citizenship or statehood . . . could be permanently excluded from the American political community and deprived of equal rights.”).

U.S. continent to sanction Puerto Rico's colonial status,⁷ Hawai'i planters' persistent negative cultural images fueled the argument that Puerto Ricans were undeserving of participation in the U.S. polity.

This injustice persists. It is underscored by the highly charged attempts to push a congressionally mandated referendum on Puerto Rico's political status⁸ and by the United Nations Decolonization Committee's efforts to expedite the self-determination process for the Puerto Rican people.⁹ It is felt in recent litigation to secure the Puerto Rican vote in U.S. presidential elections,¹⁰ and in one Puerto Rican's hard-fought struggle to obtain a certificate of Puerto Rican citizenship.¹¹ And it is rooted in the racialized images of the past—images inscribed in and reproduced through law.

⁷ See *infra* Part III.A.

⁸ Jake Sherman, *Puerto Ricans Split on Statehood Vote*, POLITICO (Apr. 27, 2010, 4:46 AM), <http://www.politico.com/news/stories/0410/36380.html>; Bernie Becker, *House Approves Puerto Rico Plebiscite*, N.Y. TIMES CAUCUS BLOG (Apr. 29, 2010), <http://thecaucus.blogs.nytimes.com/2010/04/29/house-approves-puerto-rico-plebiscite/>; *House Vote on Puerto Rico's Status Divides Hispanic Lawmakers*, DEMOCRACY NOW! (May 6, 2010), http://www.democracynow.org/2010/5/6/house_vote_on_puerto_ricos_status; Frances Robles, *Puerto Ricans May Get Vote on Statehood*, MIAMI HERALD, June 25, 2009, at A5. This article does not address or take a position on the varying political statuses advocated by Puerto Rico's three main political parties: the Partido Popular Democrático ("PPD" or Popular Democratic Party), which favors an "enhanced" Commonwealth status; the Partido Nacionalista Progresista ("PNP" or National Progressive Party), which promotes statehood; and the Partido Independientista Puertorriqueño ("PIP" or Puerto Rican Independence Party), which backs independence from the United States. See Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159 (1998).

⁹ Press Release, General Assembly, Special Committee on Decolonization Passes Text Urging General Assembly to Consider Formally Situation Concerning Puerto Rico; Draft Resolution Calls on United States to Expedite Island's Self-Determination, U.N. Press Release GA/COL/3209 (Jun. 21, 2010); see also Jon M. Van Dyke, et al., *Self-Determination For Non-self-Governing Peoples and for Indigenous Peoples: The Cases of Guam And Hawai'i*, 18 U. HAW. L. REV. 623, 629–40 (1996) (examining international law principles relating to the self-determination of non-self-governing peoples and indigenous peoples).

¹⁰ See generally *Igartúa-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (en banc) (Igartúa III).

¹¹ Frances Robles, *Court Win Fuels Puerto Rican Citizenship Debate*, MIAMI HERALD, July 14, 2007, at A1 (reporting that Juan Mari Brás, a Puerto Rico independence advocate who renounced his U.S. citizenship in an attempt to become officially recognized as a citizen of Puerto Rico, received the first certificate of Puerto Rican citizenship in October 2006 after winning a court battle over his right to vote in local elections). See also Rogers M. Smith, *The Bitter Roots of Puerto Rican Citizenship*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 373–74 (Christina Duffy Burnett & Burke Marshall, eds. 2001) [hereinafter Smith, *Bitter Roots*] (describing the *Ramirez v. Mari Brás* case, in which the Puerto Rico Supreme Court ruled that Mari Brás was a citizen of Puerto Rico even though he renounced his U.S. citizenship). See also Napoli, *supra* note 8 (exploring the legal recognition of Puerto Ricans' national rights within the United States).



** PAC. COM. ADVERTISER, Sept. 4, 1901, at 1.

I. INTRODUCTION

In 2008, many in the United States awoke to a startling reality: Puerto Rico had become an improbable player in the Democratic presidential primary. In one of the most extraordinary presidential elections in U.S. history, Puerto Rico's voters were poised to cast what may have been the

deciding primary votes for either the first woman or the first African American Democratic presidential nominee.¹² Puerto Rico's people, in their hearts and hands, may well have possessed the power to determine which candidate ascended. Yet, grounded in historical characterizations of Puerto Ricans as "unqualified" and "incapable of self-government," the United States has continued to bar them from voting in the presidential election itself.¹³

Why this disjuncture? Several legal scholars have explored at length Puerto Rico's colonial status and its people's second-class citizenship.¹⁴

¹² See Susan Milligan, *Presidential Primary Brings Attention, Frustration to Puerto Rico*, BOS. GLOBE, May 31, 2008, at 1; Larry Eichel, *Puerto Rico's Primary Importance*, SEATTLE TIMES, June 1, 2008, at A13; Kim Chipman & Nicholas Johnston, *Obama, Clinton Make Campaign Pitches in Puerto Rico*, BLOOMBERG.COM (May 24, 2008), <http://www.bloomberg.com/apps/news?pid=20601103&sid=ai9g7STRKNPs&refer=us>; Michael Janeway, *Puerto Rico's Moment in the Sun*, N.Y. TIMES, May 22, 2008, at A31. Puerto Rico has approximately 2.5 million voters. Eli Saslow, *Bill Clinton Visits Puerto Rico, Rich in Culture and Delegates*, WASH. POST., Apr. 8, 2008, <http://www.washingtonpost.com/wpdyn/content/article/2008/04/07/AR2008040702603.html>. Puerto Rico was awarded sixty-three Democratic Party delegates—more delegates than twenty-seven of the fifty states. Indira A. R. Lakshmanan, *Puerto Ricans Help Pick Nominee They Can't Vote for in November*, BLOOMBERG.COM (May 20, 2008), http://www.bloomberg.com/apps/news?pid=20601103&sid=ao0mP6ntt_H8&refer=us; see Juan Gonzalez, *Puerto Rico's Overlooked Primary and a Bitter Divide Within the SEIU*, DEMOCRACY NOW! (Jun. 3, 2008), http://www.democracynow.org/2008/6/3/juan_gonzalez_on_puerto_ricos_overlooked (attributing Puerto Rico's low voter turnout in the 2008 primary in part to the overwhelming sentiment that participation in the primary was meaningless because voters could not vote in the general election).

¹³ David Brody, *Puerto Ricans Head to Polls Sunday*, CBN NEWS, May 29, 2008, available at <http://www.cbn.com/CBNnews/382255.aspx>; see *infra* Part III.A. Puerto Ricans have been U.S. citizens for nearly a century—since 1917. See Jones Act (Puerto Rico), ch. 145, § 5, 39 Stat. 951 (1917). They do not have voting representation in Congress, but can be drafted and have fought in U.S. wars. See *Igartúa III*, 417 F.3d at 168, 177. At the same time, "Puerto Rico is subject to the national legislative and executive regulatory processes performed in the United States, and the laws and regulations that are produced are enforced in Puerto Rico by federal executive and judicial officials." Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 38–39 (2000) [hereinafter Malavet, *Cultural Nation*].

¹⁴ See, e.g., PEDRO MALAVET, *AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* (2004) [hereinafter MALAVET, *AMERICA'S COLONY*]; Pedro A. Malavet, *The Constitution Follows the Flag . . . but Doesn't Quite Catch Up with It: The Story of Downes v. Bidwell*, in RACE LAW STORIES 111 (Rachel F. Moran & Devon W. Carbado, eds. 2008) [hereinafter Malavet, *The Story of Downes v. Bidwell*]; EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* (2001) [hereinafter RIVERA RAMOS, *LEGAL CONSTRUCTION OF IDENTITY*]; EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* (2006) [hereinafter ROMÁN, *OTHER AMERICAN COLONIES*]; Cabranes, *Citizenship*, *supra* note 5; José Trias Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U.P.R. 1 (1999) [hereinafter Trias Monge, *Plenary Power*]; Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65

Some critique the legal doctrines that permit the United States' disparate treatment of Puerto Rico. Others unpack the racialized rhetoric that justified Puerto Rico's conquest and colonization.¹⁵ What is missing is an illumination of an unexplored, pervasive reason for the persistence of damaging stereotypes undergirding Puerto Rican disenfranchisement.

The inquiry that sheds light on the politics underlying the legal blockade of the Puerto Rican franchise originates thousands of miles from Puerto Rico, in Hawai'i. It is a little-told story of the systematic racialization of Puerto Ricans by private plantation interests and Hawai'i's territorial government to control the labor force and ensure that Puerto Ricans could not exert political power over their lives.

In the early 1900s, plantation-controlled news accounts and U.S. and Hawai'i government reports depicted Hawai'i's Puerto Rican laborers alternatively as "squalid" and "piteous," "indolent" and "shiftless," "unruly" and "treacherous," or "happy" and "contented."¹⁶ Some of the United States' largest newspapers echoed these negative depictions.¹⁷ U.S. decision makers had already deployed some of these depictions to bolster the United States' conquest of Puerto Rico, and U.S. agribusiness and Hawai'i's government spread these images to destabilize and dehumanize Puerto Ricans as a means of social control. Combined, these racialized portrayals operated to keep Puerto Ricans at the U.S. polity's margins in both Hawai'i and Puerto Rico, two territories of the newly expanded U.S. empire.¹⁸

This need for strict social and political control had deep roots in the relationship between the Hawai'i sugar planters and Washington, D.C. politicians. Hawai'i's sugar barons exerted considerable direct influence over the growth of agribusiness in the United States, helping to transform agriculture from small farms into multi-national corporate-controlled "big business."¹⁹ In doing so, Hawai'i's plantation owners intertwined their in-

REV. JUR. U.P.R. 225 (1996) [hereinafter Rivera Ramos, *Legal Construction of American Colonialism*]; Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997).

¹⁵ See, e.g., Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998) [hereinafter Román, *Alien-Citizen Paradox*]; Malavet, *Cultural Nation*, *supra* note 13; Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 11 [hereinafter Perea, *Fulfilling Manifest Destiny*].

¹⁶ See *infra* Parts III.C–III.D.

¹⁷ See *infra* Part III.E.

¹⁸ See *id.*

¹⁹ See GEORGE COOPER & GAVAN DAWS, *LAND AND POWER IN HAWAII: THE DEMOCRATIC YEARS 208–13* (1990).

terests with political interests in Washington, D.C., enabling U.S. militarization and indeed imperialism in the Pacific.²⁰ To further Hawai'i's agribusiness trade, and to secure American militarism in the Pacific, the sugar planters and Washington politicians then agitated for Hawai'i's annexation to the United States.²¹ Following annexation, when Hawai'i became a U.S. territory, plantation owners had to exert control over recalcitrant workers. In this setting, the planters' racialization of the workers generated a "collective memory" of Puerto Ricans as inferior, uncivilized, and unfit for political participation. That memory was inscribed in and reproduced through law and media to foster systemic present-day exclusion.²² And it is that memory that poses a sizeable threshold barrier for Puerto Rican justice advocates.

The Hawai'i experience thus illuminates an important theoretical development: the collective memory of injustice as a prelude to reparatory justice initiatives. As Eric Yamamoto posits, justice struggles are "first and foremost, active, present-day struggles over collective memory."²³ Who tells the definitive history of group injustice—and *how* that history is framed—is vital to shaping a group's narrative and public image. And it can "determine the power of justice claims or opposition to them."²⁴ More than a simple backward-looking recitation of historical "facts," the framing of group memories of injustice thus involves active construction in the present.²⁵

²⁰ In 1875, after forty years of negotiations and at the urging of Hawai'i's sugar planters, Hawai'i's King Kalākaua signed a Hawai'i-U.S. reciprocity treaty. According to the treaty, the Kingdom in effect promised to the United States Pearl Harbor—later the U.S.'s crucial military base in the Asia-Pacific theater—by agreeing not to lease or sell it to any other power; in exchange, the U.S. eliminated the high tariffs on "foreign" Hawai'i sugar, triggering explosive growth in the sugar industry. See VAN DYKE, *supra* note 3, at 118–20, 155.

²¹ See EDWARD D. BEECHERT, *WORKING IN HAWAII: A LABOR HISTORY* 84 (1985).

²² See Eric K. Yamamoto, *Representing Race: Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 843–43 (1997) [hereinafter Yamamoto, *Critical Race Praxis*] (describing the ways in which law often inscribes and reproduces negative cultural representations of racial groups, thereby fostering and justifying systemic oppression). See also Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 141 (asserting that U.S. treaties, statutes, and Supreme Court decisions used race to exclude conquered peoples from U.S. political and social life); see generally RACE LAW STORIES (Rachel F. Moran & Devon Wayne Carbado, eds. 2008) (describing how racial consciousness is inscribed in case law).

²³ Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1771 (2000).

²⁴ Eric K. Yamamoto & Catherine Corpus Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of Rice v. Cayetano*, in RACE LAW STORIES 558 (Rachel F. Moran & Devon W. Carbado, eds. 2008).

²⁵ See Hom & Yamamoto, *supra* note 23, at 1757.

Fierce battles over the collective memory of injustice lie at the core of many court decisions. A judge's recounting of history shapes the present-day understanding of injustice, the current need for rectification, and the likely courses of action.²⁶ The *Igartúa de la Rosa v. United States*²⁷ decision in 2005 is emblematic. The First Circuit Court of Appeals' en banc majority's bland portrayal of Puerto Rican history, reproduced from past cases and writings, was fiercely contested in Judge Juan Torruella's dissent.²⁸ In holding that Puerto Ricans have no constitutional or international law right to vote in U.S. presidential elections, the majority erased and sanitized harsh Puerto Rican history, making its decision to deny the Puerto Rican vote seem both logical and natural.²⁹ For Judge Torruella, on the other hand, the stark—and racialized—history of the U.S. colonization of Puerto Rico and the majority's further enshrinement of that colonial relationship demanded legal intervention to correct the “monumental injustice to Puerto Rico's nationally disenfranchised United States citizens.”³⁰

Thus, the question of Puerto Ricans' right to vote with all of its related legal claims is really a threshold struggle over the collective memory of how Puerto Rico was “acquired” by the United States, the ensuing treatment of Puerto Ricans (both on and off the island), and the kind of derogatory racialization that justified the United States' past and continuing exclusionary actions. This has broader relevance for groups seeking both traditional and innovative remedies for the persisting harms of colonization within the territorial confines of the United States. It also has implications for groups struggling against colonization worldwide.³¹

This Article uncovers one story of racialization that helped to shape the modern-day collective memory of Puerto Ricans. That group memory, in part, bears on present-day Puerto Rican justice claims and responses to them. Part II introduces the “collective memory of injustice” as a relevant theoretical framework and highlights the role of racialization³² and rac-

²⁶ See Yamamoto & Betts, *supra* note 24, at 563, 565.

²⁷ *Igartúa-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (en banc) (*Igartúa III*).

²⁸ See *infra* Part IV.B.

²⁹ See *infra* Part IV.A.

³⁰ *Igartúa III*, 417 F.3d at 159–69, 183 (Torruella, J., dissenting).

³¹ See *infra* notes 388–94 and accompanying text.

³² See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (1994).

ism³³ in shaping collective memory. Part III explores the prevailing narrative of the United States' relationship with Puerto Rico. It also unearths a similar, though rarely told, story of racialization of Puerto Ricans by Hawai'i's sugar planters and government to ensure that Puerto Ricans had no right to vote there. Part IV analyzes the collective memory embedded in the legal text of *Igartúa de la Rosa v. United States*, with particular emphasis on Judge Torruella's dissenting counternarrative, in the context of the burgeoning scholarship on Puerto Rico's colonial status. Finally, Part V illuminates how that long-developed collective memory persists today at a deep subconscious level and legitimates continued control and exclusion.

II. THE COLLECTIVE MEMORY OF INJUSTICE

Sylvia Lazos Vargas asserts that historical analysis is essential to understanding the role of race in society and law.³⁴ For her, history is important to the study of race because it "describes the evolution of a racial group's standing in American society today—how it came to be that a particular group did not successfully 'melt' into the melting pot that is American culture today and remained distinctly a racial other."³⁵ History is important to the study of law and society because lawyers and scholars "can better understand the origin of rules . . . [and] racial origins of precedent" in order to make "present day arguments as to why these rules should be changed."³⁶

³³ See ALBERT MEMMI, *DOMINATED MAN: NOTES TOWARD A PORTRAIT* 194 (1968) [hereinafter MEMMI, *DOMINATED MAN*] ("Racism is the generalized and final assigning of values to real or imaginary differences, to the accuser's benefit and at his victim's expense, in order to justify the former's own privileges or aggression.").

³⁴ Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900*, 78 DENV. U. L. REV. 921, 940 (2001).

³⁵ *Id.*; see generally Adeno Addis, *On Human Diversity and the Limits of Toleration*, in ETHNICITY AND GROUP RIGHTS 112, 126 (Ian Shapiro & Will Kymlicka, eds. 1992) (describing "othering").

³⁶ Lazos Vargas, *supra* note 34, at 940. Lazos Vargas urges critical analysis of the Spanish-American War to uncover how the war recast Puerto Ricans, Native Hawaiians, Guamanians, and Filipinos into "subordinated civic positions," and how it continues to impact the United States' island territories as well as the Philippines, Cuba, and Latin America. *See id.* at 942-43; see also Christina Duffy Burnett, *They Say I Am Not American . . . : The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659, 667 (2008) (contending that the study of the legal history of the United States' empire, particularly the *González v. Williams* case, sheds light on how "turn-of-the-twentieth-century imperialism helped shape a modern American nation").

To these insights, Yamamoto adds the dimension of collective memory.³⁷ From this view, history plays yet another vital role: exploring history also means delving “into the archives of mind, spirit, and culture—then and now.”³⁸ This means that we are not just retrieving group histories. Instead, “[w]e are helping construct them as we go, within a context of not only rights norms but also larger societal understandings of injustice and reparation.”³⁹

A. “REMEMBERING” GROUP INJUSTICE

Memories of historical injustice are formed and reformed by group experiences, shifting ideologies, and social circumstances. These group memories inform current conflicts and “shape the ways in which racial wounds are aggravated or salved.”⁴⁰ The framing of injustice is thus about “social memory.”⁴¹ A narrow framing of injustice, for example, may focus tightly on the elements of civil rights claims while ignoring crucial aspects of history and community agitation that often underlie those claims.⁴² In contrast, some groups seeking social justice describe injustice more expansively.⁴³ They broaden the law’s narrow framing of injustice to include historical facts that “more fully portray what happened and why it was wrong. In this way, history becomes a catalyst for mass mobilization and collective action aimed at policymakers, bureaucrats, and the American conscience.”⁴⁴ Both of these approaches, contends Yamamoto, “miss something of considerable strategic import.”⁴⁵ For him, “[s]ocial understandings of historical injustice are largely constructed in the present. Those understandings are rooted less in backward-looking searches for ‘what happened’ than in the present-day dynamics of collective memory.”⁴⁶

In attempts to frame the collective memory of historical injustice, “[i]ndividuals, social groups, institutions, and nations filter and twist, recall and forget ‘information’ in reframing shameful past acts (thereby les-

³⁷ Hom & Yamamoto, *supra* note 23, at 1757.

³⁸ *Id.* at 1764.

³⁹ *Id.*

⁴⁰ *Id.* at 1757.

⁴¹ *Id.* at 1756.

⁴² *Id.* at 1757.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

sening responsibility) as well as in enhancing victim status (thereby increasing power).⁴⁷ Not only does collective memory enliven a group's past, it also reconstructs it. Thus, Yamamoto contends, "How a community frames past events and connects them to current conditions often determines the power of justice claims or of opposition to them."⁴⁸ In this way, "'remembering' the past is neither innocent nor objective."⁴⁹

Public trials and their accompanying court decisions are particular sites for the framing of collective memories of injustice. Indeed, "justice claims . . . begin with back-and-forth struggles over the creation of public or collective memory. Those struggles are a fight over who will tell the dominant story of injustice (or absence thereof) and how that story will be shaped."⁵⁰ A judge's choice of what story to tell "is determined by a sifting of the relevant from the irrelevant—a process itself affected by the decision maker's cultural framework."⁵¹ That framework consists of his or her "social perceptions, beliefs, and practices that form the lens through which . . . [he or she] sees and evaluates both daily happenings and society as a whole."⁵² That judge's recounting of historical events often determines whether, and to what extent, historical injustice occurred and the present-day need for rectification.⁵³

⁴⁷ *Id.* at 1758 ("Collective memory not only vivifies a group's past, it also reconstructs it and thereby situates a group in relation to others in a power hierarchy.").

⁴⁸ Yamamoto & Betts, *supra* note 24, at 558.

⁴⁹ Hom & Yamamoto, *supra* note 23, at 1762.

⁵⁰ Yamamoto & Betts, *supra* note 24, at 563.

⁵¹ *Id.* at 565.

⁵² *Id.* at 565 (citation omitted); see also Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) (acknowledging that individual experiences, along with race and gender, "affect the facts that judges choose to see," and thereby impact judicial decision making).

⁵³ Yamamoto & Betts, *supra* note 24, at 563. Rivera Ramos similarly recognizes that by describing Puerto Ricans as an inferior racial group incapable of self-governance instead of as "a people with a history, aspirations, capacities, etc.," the U.S. Supreme Court was able to "define[] Puerto Ricans not as a nation, but as inhabitants of an island that had become a possession of the United States." Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 305. According to Rivera Ramos, "[t]he concept of 'inhabitant' has a neutral quality, deprived . . . of any reference to culture, history, language or other elements constituent of a national identity. Moreover, the term connotes a certain atomization, an ultimately individualist reduction, that avoids the consequences of any notion of collective right." *Id.* On the other hand, defining "Puerto Rico as a 'nation,' or Puerto Ricans as a 'people,' . . . might have required a different mode of defining [its or] their relationship to the United States government." *Id.* In this way, the Insular Cases "were part of a process of construction of a new identity and of the constitution of a new legal and political subject." *Id.* at 306. Thus, when courts later use these so-called "neutral" terms like "inhabitant," they are actually drawing on those collective memories of Puerto Ricans as unworthy and inferior.

Put another way, courts are storytelling institutions. In addition to rendering judgments on narrow legal questions, courts “engage dialectically with other dominant political institutions, with [people’s] preexisting cultural assumptions, and [with] other sources of cultural authority.”⁵⁴ Through case law, public trials, and media, ideas about the fitness of social groups to participate in the polity are translated “into the material social conditions that confirm and entrench those ideas.”⁵⁵ In this way, controversial cases reshape the way the U.S. public views race and social justice.⁵⁶

Collective memories are thus inscribed in and reproduced through law and media in ways that often foster systemic, present-day exclusion.⁵⁷ Indeed, the law often functions as a “discursive strategy backed by force.”⁵⁸ The law assesses cultural difference and marks inferiority upon racialized groups. It then “inscribes [the] inferior identity into a legal text .

⁵⁴ Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 122 (David Kairys ed., 2d ed. 1991). Yamamoto observes that courts are “sites and generators of cultural performances.” Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians’ Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 6 (1994) [hereinafter Yamamoto, et al., *Cultural Performance*]. From this view, courts transform legal disputes into public messages or socio-legal narratives about groups, institutions, and relationships. *See id.* at 27. A prevailing cultural narrative can be sustained or contested through the sculpting and retelling of stories through the judicial process. *Id.* at 21. Courts serve as locations to illuminate institutional power arrangements and to tell dominant stories and counterstories in order to refute dominant narratives. *See* Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 628 (1990); Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412–16 (1989). Courts thus serve as forums for processing complex, conflicting social-cultural narratives with historical foundations. Yamamoto et al., *Cultural Performance*, *supra*, at 8.

⁵⁵ IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 10 (1996). Similarly, Rivera Ramos asserts that, in regard to Puerto Rico, the *Insular Cases*, discussed *infra*, “became part of the ‘reality’ of the colonial project.” Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 303. For him, “[t]he legal ‘truth’ that Puerto Rico and the Philippines were ‘unincorporated territories,’ that Congress had plenary power over them, that their inhabitants could claim only limited protection from the Constitution, etc., came to be part of the social understanding of the policy makers, part of the way in which the political reality of the new territories came to be perceived.” *Id.* at 303.

⁵⁶ *See* Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War On Terror*, 101 MICH. L. REV. 1269, 1272 (2003) (asserting that lawsuits for African American reparations will “reshape the way the American public and countries worldwide view American racial justice”) [hereinafter Yamamoto, Serrano & Rodriguez, *American Racial Justice on Trial*].

⁵⁷ *See* Yamamoto, *Critical Race Praxis*, *supra* note 22, at 843–44.

⁵⁸ *Id.* at 843.

. . . that then legitimates paternalism . . . or negation.”⁵⁹ Sometimes the law inscribes and reproduces salutary ideas and group images. Often, however, the law “reflects dominant interests and fosters structural ‘oppression less by coercion than by offering people identities contingent upon their acceptance of oppression as defining characteristics of their very selves.’”⁶⁰

As discussed below, the majority and dissenting opinions in *Igartúa de la Rosa* illuminate a fierce struggle over collective memory—a battle over who would tell the definitive story of U.S. colonization at the dawn of the twentieth century and the resulting treatment of Puerto Rico and its people.⁶¹ Those contested stories shape present-day understandings of past injustice and thus influence the current treatment of the Puerto Rican people.

B. HISTORICAL RACIALIZATION AND RACISM: A FOUNDATION FOR COLLECTIVE MEMORY

Collective memories are formed and transformed through cultural media, such as news accounts, books, and government reports. At the turn of the twentieth century, cultural media spread damaging characterizations of racial groups as “other” and threatening, thereby justifying—in the public eye—harsh acts against those groups. The theory of “racial formation” helps to illuminate and explain these reported racial depictions.

According to critical sociologists Michael Omi and Howard Winant, “[r]acial formation is a sociohistorical process by which social and political forces continually create, shape and transform race, thereby imparting racial meaning to groups, social practices and events. Race is thus change-

⁵⁹ *Id.* at 843–44. Law functions as a “cultural system that structures relationships throughout society, not just those that come before courts.” *Id.* at 844 (quoting Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 889 (1988)). Law is “an integral part of political-cultural processes that generate ‘structures of meaning that radiate throughout social life and serve as part of the material people use to negotiate their understanding of everyday events and relationships.’” *Id.* at 841–42 (quoting David M. Trubek, *The Handmaiden’s Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW AND CONTEMP. PROBS. 111, 124 (1988)). Cultural representations or stories about a racialized group’s subordinate status thus become inscribed in legal text and imprinted into social structure, thereby sanctioning a racial hierarchy. *See id.* at 843–44 (contending that dominant socio-legal narratives legitimize systemic oppression of racialized minorities); *see also* Lazos Vargas, *supra* note 34, at 941 (maintaining that formalist applications of precedent re-inscribe past racial attitudes and subordination).

⁶⁰ Yamamoto, *Critical Race Praxis*, *supra* note 22, at 844 (quoting Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 889 (1988)). For this reason, Yamamoto contends, “[l]aw is experienced in this fashion by racial minorities as injustice, not because of any particular hostile legislative enactment or court ruling, but because of the systemic oppression it legitimates.” *Id.*

⁶¹ *See infra* Part IV.

able rather than fixed, political rather than biological and value-laden rather than neutral.”⁶² “As races are continually formed and reformed, they are imbued with social meaning—the process of racialization. Racialization thus signifies the extension of racial meaning to a previously racially unclassified relationship, social practice, or group.”⁶³

For Omi and Winant, race as a social construction has two components: cultural representation and social structure.⁶⁴ Cultural representa-

⁶² See OMI & WINANT, *supra* note 32, at 55–56. Omi and Winant define racial formation as “the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.” *Id.* at 55. They describe racial formation as “a process of historically situated projects in which human bodies and social structures are represented and organized.” *Id.* at 55–56. In addition, racial formation is connected to the “evolution of hegemony, the way in which society is organized and ruled.” *Id.* at 56. Based on racial formation theory, Ian Haney Lopez offers a theory of “racial fabrication” to emphasize the human element of racialization. See Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994) (describing race as socially fabricated by humans rather than created by natural differentiation); HANEY LÓPEZ, *supra* note 55, at 133–37.

Scholars across disciplines now agree that race is not an unalterable, biological characteristic; instead, it is a social construction that plays an essential part in structuring and representing the social world. See Susan Kiyomi Serrano, Comment, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 U. HAW. L. REV. 221, 240–41 (1997) [hereinafter Serrano, *Rethinking Race*]. According to Omi and Winant, race is understood as an “unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle.” OMI & WINANT, *supra* note 32, at 55. This notion of race provides the basis for Omi and Winant’s theory of “racial formation.” *Id.*

⁶³ Serrano, *Rethinking Race*, *supra* note 62, at 241–42 (quotations and citations omitted); see Michael Omi, *Out of the Melting Pot and into the Fire: Race Relations Policy*, in THE STATE OF ASIAN AMERICA: POLICY ISSUES TO THE YEAR 2020 203 (1993); see also John O. Calmore, *Racialized Space and the Culture of Segregation: Hewing A Stone of Hope from a Mountain of Despair*, 143 U. PA. L. REV. 1233, 1235 (1995) (describing racialization as a “dialectical process of signification”); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA AS. PAC. AM. L.J. 33, 61 (1996) (developing “differential racialization” theory that “acknowledges that historical and contemporary influences racialize different racial groups differently”). Latinos/as, in particular, were—and are—racialized in myriad ways. See Kevin R. Johnson, *Comparative Racialization: Culture and National Origin in Latino Communities*, 78 DENV. U. L. REV. 633 (2001) (discussing “comparative racialization,” which describes “how society constructs, or racializes, or ‘others,’ various Latin American groups in different ways”).

⁶⁴ OMI & WINANT, *supra* note 32, at 56. Racial projects are a related concept. “Racial projects are the social mechanisms through which representational and structural changes lead to changes in racial identity and meaning.” Serrano, *Rethinking Race*, *supra* note 62, at 243 (quotations omitted). A racial project is “simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines.” *Id.* (quotations and citations omitted). “Webs of racial projects combine to create cultural and racial meaning.” OMI & WINANT, *supra* note 32, at 89. The “Asian American” category, for example, formed as a political label for the first time in the 1960s. *Id.* Until then, each ethnic group such as Chinese Americans, Japanese Americans, and Korean Americans were recognized separately—each with small numbers and little political clout. WILLIAM WEI, THE ASIAN AMERICAN MOVEMENT 26 (1993). In the 1960s these groups coalesced politically into a

tions of groups are central to the process of racialization. Cultural representation involves the attachment of cultural images to generally recognized racial groups, thereby interpreting events and intergroup dynamics and imbuing those events and groups with racial meaning.⁶⁵ At one level, cultural representations can be blatantly racialized. These include representations of the African American crack dealer,⁶⁶ the sinister Chinese,⁶⁷ the lazy Mexican,⁶⁸ or the white man who “can’t jump.”⁶⁹ These racial stereotypes provide people with “common sense” explanations of our everyday experiences and perceptions.⁷⁰ Organizations and institutions at the same time draw upon “common” racial meanings to support these stereo-

singular “Asian American” racial category that became recognized legally by the federal census, courts and legislatures. *Id.* For the first time these groups shared a common legally recognized racial identity and, in some respects, despite continuing internal dissonance, gained political clout as Asian Americans. See OMI & WINANT, *supra* note 32, at 89. Native Hawaiians were racialized when the distinction between “Hawaiian” and “native Hawaiian” was constructed. Pressured by sugar plantations to limit the amount of benefits Hawaiians would receive, Congress defined “native Hawaiian” as “those people with 50 percent or more native blood.” Hawaiian Homes Commission Act, 42 Stat. 108 (1921). This definition designated two classes of people of Hawaiian ancestry by mandating that those who have less than fifty percent native blood are “Hawaiian” and are defined as “any descendent of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778.” *Id.*

⁶⁵ OMI & WINANT, *supra* note 32, at 60.

⁶⁶ See PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 85–88 (1991).

⁶⁷ WEI, *supra* note 64, at 48. See also Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997) (describing the seemingly contradictory, but interconnected, images of Asian Americans as both “model minority,” and “yellow peril”).

⁶⁸ RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* (1993) [hereinafter TAKAKI, *DIFFERENT MIRROR*].

⁶⁹ OMI & WINANT, *supra* note 32, at 59.

⁷⁰ *Id.* at 54. See also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187–90 (1995) (asserting that racial stereotypes, as unconscious forms of bias, affect intergroup judgment and decision making); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493–95 (2005); Gary Blasi, *Advocacy Against The Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1267–68 (2002); Judith Olans Brown, Stephen N. Subrin & Phyllis Tropper Baumann, *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1494–95 (1997); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, and Misremembering*, 57 DUKE L.J. 345, 353 (2007); Anthony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 186 (2005); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1004 (2006).

types—hiring Asian Americans as midlevel managers, for example, because they “follow orders” and do not “make waves.”⁷¹

By attributing positive or negative social meanings to race, the racialization process also affects social structure. In a racial formation context, institutional structures serve to clarify racial representations, create racial hierarchies, and reorganize and redistribute resources along racial lines.⁷² As Omi and Winant suggest, “[t]hrough policies which are explicitly or implicitly racial, state institutions organize and enforce the racial politics of everyday life.”⁷³ In this sense, “[t]he racial order is equilibrated by the state—encoded in law, organized through policy making, and enforced by a repressive apparatus.”⁷⁴ Social structures and everyday experiences are racially organized based upon cultural representations. This, in turn, creates racial meaning.

Racial meanings are deeply embedded in the process of colonization. International scholar Albert Memmi, a Tunisian Jew and resister of French colonialism, incisively describes how race is deployed to justify colonization or political “aggression.”⁷⁵ Because the colonizer portrays itself as civilized and law-abiding, it needs a mechanism for justifying to its people and the world its bald political takeover of another country and its

⁷¹ On a deeper level, cultural representations can involve seemingly neutral cultural depictions that impart non-neutral racial meanings. In this sense, externally neutral debates couched in cultural terms can be racially coded. See DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 73 (1993); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 874 (1993) (examining and rejecting both race-based and culture-based immigration restriction arguments). Culture-based arguments that avoid race and ethnicity have implications that are distinctly race-based. As discussed below, these statements, although outwardly “cultural” are ideologically racial—they implicitly call for allocation of resources along racial lines. See Yamamoto, *Critical Race Praxis*, *supra* note 22, at 848. In this manner, “culture is a surrogate for race.” ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 67 (2000); see also Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 770 (1994) (observing that race is “deeply embedded” in language, perceptions, and culture, and is “inscribed in the most innocent and neutral-seeming concepts”). Harris explains that critical race theorists question law’s objectivity and neutrality by “arguing that what looks like race-neutrality on the surface has a deeper structure that reflects white privilege.” *Id.* at 754. Racial formation theory thus reveals that race and culture are dependent and connected.

⁷² OMI & WINANT, *supra* note 32, at 56.

⁷³ *Id.* at 83 (emphasis omitted).

⁷⁴ *Id.* at 84; see also HANEY LÓPEZ, *supra* note 55, at 7 (“[L]egislatures and courts have served not only to fix the boundaries of race in the forms we recognize today, but also to define the content of racial identities and to specify their relative privilege or disadvantage in U.S. society.”).

⁷⁵ MEMMI, *DOMINATED MAN*, *supra* note 33, at 186–95.

people.⁷⁶ For Memmi, “racism” is not simple ignorance or skin-color prejudice. Rather, it involves the process of characterizing people as “different,” less-worthy, or less-human “others” (threatening, uncivilized, inferior) to make political aggression against the entire group for economic or military reasons appear necessary.⁷⁷

Memmi described four steps, or discursive strategies—which we can also think of as key aspects of the racialization process—used by European-derived cultures to justify the colonization of non-white races: (1) stressing the real or imaginary differences between the racist and its victim; (2) assigning values to those differences, to the advantage of the racist and the detriment of its victim; (3) trying to make them absolutes by generalizing from them and claiming that they are final; and (4) justifying any present or possible aggression or privilege.⁷⁸

As described below, Hawai‘i’s planters and government deployed all four of Memmi’s discursive strategies to justify the exclusion and marginalization of Puerto Ricans and others in territorial Hawai‘i.⁷⁹ Puerto Ricans were racialized on two levels described here: the macro—by U.S. decision makers to support U.S. imperialism in Puerto Rico itself, and the

⁷⁶ *Id.* at 186; ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 69–76 (1965) [hereinafter MEMMI, *COLONIZER*]; Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 262 (1989) (applying Memmi’s framework to Native Americans).

⁷⁷ See Susan K. Serrano et al., *Restorative Justice for Hawai‘i’s First People: Selected Amicus Curiae Briefs in Doe v. Kamehameha Schools*, 14 ASIAN AM. L.J. 205, 217 (2007) [hereinafter Serrano et al., *Restorative Justice*] (citing amicus brief using Memmi’s framework). See also Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 140 (applying Memmi’s insights to the U.S. conquest of Puerto Rico); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370 (1988) (contending that “the subordination of Blacks was rationalized by a series of stereotypes and beliefs that made their conditions appear logical and natural.”); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1260 (1992) (describing negative historical depictions of the major groups of color in the United States).

⁷⁸ MEMMI, *DOMINATED MAN*, *supra* note 33, at 186. For Memmi, the “colonizer discriminates to demonstrate the impossibility of including the colonized in the community: because he would be too biologically and culturally different, technically and politically inept, etc.” *Id.* at 187; see also MEMMI, *COLONIZER*, *supra* note 76, at 69–76 (describing the colonizer’s use of racism); Williams, *supra* note 76, at 265 (“[T]he strategic use of difference to intensify the separation of peoples of color unites the colonizing discourses deployed by Europeans in all the lands they have invaded and conquered.”); EDWARD SAID, *CULTURE AND IMPERIALISM* 9 (1993) (“[Colonialism and imperialism] are supported and perhaps even impelled by impressive ideological formations that include notions that certain territories and people *require* and beseech domination, as well as forms of knowledge affiliated with domination.”).

⁷⁹ See *infra* Parts III.C. –III.D.

micro—by white American agribusiness and government in Hawai‘i to destabilize and dehumanize Puerto Ricans as a means of social control. These two levels of racialization coalesced to support the exclusion of Puerto Ricans from the U.S. polity in both Hawai‘i and Puerto Rico—two territories of the newly expanded U.S. empire.⁸⁰ This early racialization also generated an enduring “collective memory” of Puerto Ricans as inferior, unworthy, and unfit for political participation.⁸¹

III. WHAT LIES BEHIND THE COLLECTIVE MEMORY OF PUERTO RICANS?

The belief in the inherent inequality of peoples was already deeply rooted in the American consciousness before the first Puerto Ricans arrived in Hawai‘i in 1900. As Efrén Rivera Ramos asserts, the prevailing view reflected “a series of binary oppositions: the civilized and the barbarous, the prosperous and the stagnant, the rational and the irrational, the hardworking and the indolent, the self-disciplined and the disorderly, the meritorious and the undeserving.”⁸² These oppositions referred directly to race: whites were seen as holding the inherent power to expand, control, and govern, and non-white “others” were at “the receiving end of the exercise of that power.”⁸³

⁸⁰ See Blase Camacho Souza, *Trabajo y Tristeza—“Work and Sorrow”: The Puerto Ricans of Hawaii 1900–1902*, 18 HAWAIIAN J. OF HISTORY 156, 158 (1984). See also Robert C. McGreevey, *Borderline Citizens: Puerto Ricans and the Politics of Migration, Race and Empire, 1898–1948*, at 59 (Aug. 2008) (unpublished Ph.D. dissertation, Brandeis University) (on file with author) (contending that while Puerto Ricans were “increasingly included within the borders of the U.S. economy, they were defined in legal and racial terms as outside the polity”). Many events contributed to the racialization of Puerto Ricans, but this article will focus primarily on events of this time period.

⁸¹ Legal scholars have also highlighted the United States’ racialized denial of rights and membership to other groups, including territorial peoples, Native Americans, Mexicans, African Americans, Asian Americans and others. See Natsu Taylor Saito, *Asserting Plenary Power Over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL’Y REV. 427 (2002) [hereinafter Saito, *Asserting Plenary Power*]; Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 294 (noting that the rationale that democracy is “not as a matter of right, but of being worthy of belonging to the political community” was used to exclude “African Americans, Native Americans, Asians, Mexican Americans, women and the poor from the political process throughout American history”); Lazos Vargas, *supra* note 34; Perea, *supra* note 15; Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437 (2002); Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557 (2006).

⁸² Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 285–86.

⁸³ *Id.* at 286.

The narrative that emerged out of that context portrayed the United States as the “protector” of Puerto Rico.⁸⁴ According to that perspective, the United States’ superior democratic institutions and Anglo-Saxon mores saved the “backward” island from its “uncivilized” ways.⁸⁵ White Americans viewed themselves as particularly suited to “administer government among savage and senile peoples”⁸⁶ and viewed Puerto Ricans, like other territorial peoples, as “too Brown . . . and too ‘foreign’—unassimilable—to be incorporated into the United States.”⁸⁷

⁸⁴ See DeAnna Marie Rivera, *Taino Sacred Sites: An International Comparative Analysis for a Domestic Solution*, 20 ARIZ. J. INT’L & COMP. L. 443, 456 (2003) (“Congress has used [its] plenary authority to exert a purportedly benevolent guardianship role over . . . Puerto Rico.”). Although the United States claimed to be the protector of Puerto Rico, “economic conditions did not improve much during the first four decades of American rule and in several respects worsened.” Trias Monge, *Plenary Power*, *supra* note 14, at 8. Indeed,

Annual per capita personal income in 1940 was only \$121, about the same as forty years earlier. Unemployment in 1899 amounted to 17 percent, rose to 20 percent twenty years later and in 1926, just before the Depression, soared to 30.4 percent. The birth rate in 1940 was 38.7 for every thousand inhabitants, as compared to 38 in 1900. Life expectancy improved, but in 1940 was only 45.12 years for men and 46.92 for women. All federal assistance to the island amounted in 1940 to around eight million dollars.

Id.; see also Saito, *Asserting Plenary Power*, *supra* note 81, at 457 (“[M]ore than 60 percent of Puerto Rican families live below the poverty level, slightly less than in 1940.”).

⁸⁵ See Lazos Vargas, *supra* note 34, at 948 (“‘Obligations’ to a ‘higher and nobler civilization’ made it necessary for the United States to annex the Philippines and Puerto Rico, in spite of these country’s [sic] nationalist ambitions, and maintain them under tutelage until they had sufficiently learned the ways of American democracy. . . . This rhetoric made it possible to argue that this imperialist experiment was not in the pursuit of commercial ambitions or a response to racial attitudes towards those widely regarded as ‘barbarians.’”) (citations omitted); see also ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 429 (1997) (“Imperialists deployed liberalism, republicanism, and racism to contend that America’s lucky new subjects should be tutored in enlightened civilization and self-governance.”).

⁸⁶ Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525, 1536 (2008) (citing Rogers M. Smith, *Bitter Roots*, *supra* note 11, at 378 [hereinafter Fuentes-Rohwer, *Democratic Theory*] (citing 56 Cong. Rec. 711 (1900) (statement of Sen. Albert Beveridge))); see also Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 286 (“The North is learning every day by valuable experiences that there are vast differences in political capacity between the races, that it is the white man’s mission, his duty, and his right to hold the reins of political power in his own hands for the civilization of the world and the welfare of mankind.” (quoting JOHN W. BURGESS, *RECONSTRUCTION AND THE CONSTITUTION* 1866-1876 ix (1923))); Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 285 (contending that the United States’ belief in its inherent “right to expand” rested on its belief in “the principle of the inequality of peoples”).

⁸⁷ Malavet, *Cultural Nation*, *supra* note 13, at 51 (citations omitted). Another narrative was “crafted to create a false impression that all Puerto Ricans live off the ‘generosity’ of the United States.” Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 LA RAZA L.J. 387, 411 (2002) [hereinafter Malavet, *Reparations Theory*].

A. LARGE-SCALE RACIALIZATION OF PUERTO RICANS

According to Lazos Vargas, the Spanish-American War era was “a key turning point in the racial formation of Latinos/as, American foreign policy, and American democracy.”⁸⁸ The takeover of Puerto Rico,⁸⁹ the Philippines, and Guam, along with the contemporaneous annexation of the Hawaiian Islands, solidified the United States as an imperialist power.⁹⁰ As Juan Perea explains, racialization played a key role in the United States’ colonial expansion, and law justified its “racial conquest.”⁹¹ The 1898 Treaty of Paris, in particular, “redefined the democratic polity and de jure U.S. citizenship in racial and cultural terms.”⁹² According to the Treaty, while Spanish subjects residing in Puerto Rico retained their property rights and could choose to retain Spanish citizenship,⁹³ the “civil rights and political status of the native inhabitants . . . [were to] be determined by

⁸⁸ Lazos Vargas, *supra* note 34, at 921–22; see also Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9, 56–57 (2005) (describing the Mexican War and the subsequent annexation of more than half of Mexico’s territory in the 1840s as the “first imperial moment” and the precursor to the “second imperial moment,” the Spanish-American War and annexation of Hawai’i in the 1890s); Brook Thomas, *A Constitution Led by the Flag: The Insular Cases and the Metaphor of Incorporation*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 11, at 83 (describing the “growing consensus” that the colonial wars against Native Americans, the Louisiana Purchase, the Mexican-American War, and the Spanish-American War were “the logical result of an imperial spirit animating United States history from the start”).

⁸⁹ At the time of the United States’ invasion, Puerto Rico’s inhabitants had full rights as Spanish citizens. See *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 160 (1st Cir. 2005).

⁹⁰ See Manuel Rodríguez Orellana, *Vieques: The Past, Present, and Future of the Puerto Rico-U.S. Colonial Relationship*, 13 LA RAZA L.J. 425, 427 (2002) (“[C]ontrol of Puerto Rico was basic to the extension of U.S. influence over Latin America in general and the Caribbean in particular. The invasion and acquisition of Puerto Rico, which guarded the eastern approaches of the Caribbean Sea, was [sic] inextricably tied to the decision to build a canal connecting the Atlantic and Pacific Oceans.” (quoting Rubén Berrios Martínez, *Puerto Rico’s Decolonization*, 76 FOREIGN AFF. 100, 103 (1997))), available at <http://www.independencia.net/ingles/frgAffairs.html>; see also Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 313–14 (“Three fundamental drives may be identified as powerful undercurrents in the expansionist movement: the search for new markets, strategic considerations, and the felt need to compete with the other imperial powers of the day in the control of routes, markets and advantageous military locations.”); Efrén Rivera Ramos, *Deconstructing Colonialism: The “Unincorporated Territory” as a Category of Domination*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 11, at 104 [hereinafter Rivera Ramos, *Deconstructing Colonialism*] (asserting that the debate surrounding the U.S.’s acquisition of new territories was of paramount importance for U.S. decision makers because, in resolving the issue, the United States “would also be shaping its own identity within the international community”).

⁹¹ See Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 15–19.

⁹² Lazos Vargas, *supra* note 34, at 929.

⁹³ Treaty of Paris, *supra* note 6, at 1759.

the Congress.”⁹⁴ This meant that the large numbers of mixed-race inhabitants of Puerto Rico lost their Spanish citizenship and were promised no civil or political rights under U.S. rule.⁹⁵

Debates swirled over the United States’ new “imperial” role and how to handle the “racially inferior people inhabiting the conquered areas.”⁹⁶ One judge warned against bestowing constitutional guarantees upon the “ignorant” and “half-civilized” peoples of Puerto Rico and the Philippines:

Our Constitution was made by a civilized and educated people. It provides guaranties [sic] of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities . . . would . . . be a serious obstacle to the maintenance there of an efficient government.⁹⁷

⁹⁴ *Id.*

⁹⁵ See Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 156 (analyzing this language of the Treaty).

⁹⁶ See *id.* at 141. The “cession of lands resulting from the victory in the Spanish-American War, with their fairly dense populations posed difficulties” for the new colonial power. Román & Simmons, *supra* note 81, at 452. Even though the United States desired to control overseas territories, it had no intention of inviting the racially and culturally different peoples to “one day join the American body politic as full and equal citizens.” Lazos Vargas, *supra* note 34, at 929; see also Román, *Alien-Citizen Paradox*, *supra* note 15, at 29 (quoting Representative Atterson Rucker’s 1909 desire to exclude Puerto Rico) (“[B]ecause the people were the result of ‘an unreadable genealogical tree’ and because ‘[t]he production of children, especially of the dark color, is largely on the increase’”); *id.* at 24 (quoting Representative Slayden) (“We are of different races We are mainly Anglo-Saxon, while they are a composite structure, with liberal contributions to their blood from Europe, Asia, and Africa. They are largely mongrels now. . . .”) (citing 43 Cong. Rec. 2921 (1909)); THE PUERTO RICANS: A DOCUMENTARY HISTORY 122 (Kal Wagenheim & Olga Jiménez de Wagenheim, eds. 1994) (quoting an American leader as saying that Puerto Ricans “have the Latin-American excitability, and I think America should go slow in granting them anything like autonomy. Their civilization is not at all like ours yet. . . . The mixture of black and white in Porto Rico threatens to create a race of mongrels of no use to anyone. . . . A governor from the South or with knowledge of Southern remedies for that trouble, could, if a wise man, do much.”); LANNY THOMPSON, IMPERIAL ARCHIPELAGO: REPRESENTATION AND RULE IN THE INSULAR TERRITORIES UNDER U.S. DOMINION AFTER 1898 27–30 (2010) (describing early racialized characterizations of Puerto Ricans, Hawaiians, Guamanians, Filipinos and Cubans in the context of U.S. imperialism in 1898).

⁹⁷ Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899); see also José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 455 (1986) [hereinafter Cabranes, *Puerto Rico*] (observing that arguments by anti-imperialists, like Baldwin, were “political expression[s] of contempt for the peoples of the new territories”); Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 56 (1997) (contending that racial animus and commercial protectionism allowed early decision makers to hold the new territories as “dependencies” and to deny territorial peoples protec-

In thinly veiled racialized terms, a Committee on the Pacific Islands and Puerto Rico report similarly recommended against the inclusion of territories inhabited by less worthy "people of wholly different character"⁹⁸:

If [the United States] should acquire territory populated by an intelligent, capable, and law-abiding people . . . we might at once . . . incorporate that territory and people into the Union. . . . [B]ut if the territory should be inhabited by a people of wholly different character, illiterate, and unacquainted with our institutions, and incapable of exercising the rights and privileges guaranteed by the Constitution[,] . . . it would be competent for Congress to withhold from such people the operation of the Constitution and the laws of the United States, and, continuing [sic] to hold the territory as a mere possession of the United States.⁹⁹

tions reserved for American citizens); Fuentes-Rohwer, *Democratic Theory*, *supra* note 86, at 1528 (contending that race, "distrust for territorial residents," and "arbitrary rule by an overseas empire" are the "three leading themes at the heart of the colonial relationship between the United States and Puerto Rico").

Puerto Ricans were more "palatable" to political decision makers than the half-civilized "mongrels of the East" (Filipinos). Román & Simmons, *supra* note 81, at 454 (citing 33 Cong. Rec. 3613, 3616 (1900) (statement of Sen. Bate)). Representative Sereno Payne declared that, in Puerto Rico, "'whites . . . generally full-blooded white people, descendants of the Spaniards,' outnumbered by nearly two-to-one the combined total of 'negroes' and 'mulattoes.'" *Id.* at 453 (citing 33 Cong. Rec. at 1941 (statement of Rep. Payne)). In comparison, a congressional report depicted Filipinos as "'physical weaklings of low, almost dwarf, stature, with very dark skin, closely curling hair, flat noses, thick lips, and large, clumsy feet.'" *Id.* (citing 33 Cong. Rec. 3613 (1900)). Representative George Gilbert thus cautioned against "'open[ing] wide the door by which these negroes and Asiatics c[ould] pour like the locusts of Egypt into this country.'" *Id.* (citing 33 Cong. Rec. at 2172 (statement of Rep. Gilbert)). Anti-imperialists' racialized fears that territorial peoples would participate in "our" United States government mirrored those of the imperialists:

If they become states on an equal footing with the other states . . . *they will take part in governing the whole republic, in governing us*, by sending senators and representatives into *our* Congress to help make *our* laws, and by voting for president and vice-president to give *our* national government its executive. The prospect of the consequences which would follow the admission of the *Spanish creoles and the negroes* of West India islands and of the *Malays and Tagals* of the Philippines to *participation in the conduct of our government* is so *alarming* that you instinctively pause before taking the step.

RIVERA RAMOS, LEGAL CONSTRUCTION OF IDENTITY, *supra* note 14, at 40 (quoting Carl Schurz, American Imperialism, *The Convocation Address Delivered on Occasion of the 27th Convocation of the University of Chicago* (Jan. 4, 1899), in *AMERICAN IMPERIALISM IN 1898* 79 (T.P. Greene, ed. 1955)). For other examples of both imperialist and anti-imperialist racialized characterizations of territorial peoples, see *id.* at 37–42.

⁹⁸ Román & Simmons, *supra* note 81, at 455 (citing S. Rep. No. 56-249, at 8–9 (1900)).

⁹⁹ *Id.*; see also Baldwin, *supra* note 97, at 407 (fearing that territorial peoples would obtain "the same right of suffrage which may be conceded in those territories to white men of civilized races. . . . In fifty years, the bulk of the adult population of Puerto Rico, Hawaii, and the Philippines, should these then form part of the United States, will be claiming the benefit of the

The Foraker Act, officially known as the Organic Act of 1900, created Puerto Rican “citizenship” that expressly excluded Puerto Ricans from the U.S. polity.¹⁰⁰ It proclaimed that Puerto Ricans “shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States.”¹⁰¹ But that so-called citizenship was subordinate to U.S. citizenship: it was a separate category created explicitly for an “unequal race, incapable of full self-governance.”¹⁰² Even those who sup-

XV Amendment.”); Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 160 (“A principal objection to granting citizenship to Puerto Ricans was their objectionable racial composition and, therefore, their presumed incapacity for self-government.”). As Perea observes, members of Congress were also concerned about the effects of climate and racial mixture on capacity for self-government:

[P]eople who “live within 20 degrees of the equator” can neither comprehend nor support representative government constructed on the Anglo-Saxon plan.

They also see the physical degeneracy that will come from personal contact. Intimate personal association will result, as it nearly always has resulted, in a race of hybrids, who will, if experience may guide us to a conclusion, inherit the vices of both parents and the virtues of neither.

Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 160 (citing 62 CONG. REC. 2798 (statement of Rep. Slayton)); see also Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 286 (“[T]he ‘tropics’ were considered to be breeders of lazy, ignorant and inferior populations incapable of self-government and condemned to be governed from outside in order for progress and civilization ever to flourish in their midst.”). Puerto Rico teemed with tropical peoples with “heat in their blood” and was viewed as unfit for whites. See Román & Simmons, *supra* note 81, at 452 (citing RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946*, at 195–96 (1972)). Thus, “there would be no migration of whites to make the lands palatable, no assimilation to make them Anglo enough for statehood.” Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 163. On the other hand, Hawai‘i—later to become incorporated—was often viewed as “afford[ing] a wonderful field for bright, energetic, aggressive Americans.” *Judge Humphreys Attacks Sugar Interests of Hawaii*, PAC. COM. ADVERTISER, Aug. 9, 1901, at 9.

¹⁰⁰ Foraker Act, 31 Stat. 79.

¹⁰¹ *Id.* The Foraker Act “provided for the establishment of a civil government for Puerto Rico, including a limited elected legislature, and a governor and supreme court appointed by the President of the United States.” Juan R. Torruella, *Hacia Dónde Vas Puerto Rico?*, 107 YALE L.J. 1503, 1509 (1998) [hereinafter Torruella, *Hacia Dónde Vas*]. As José Cabranes pointed out, in the Act, Congress “established a tariff on trade to and from Puerto Rico and rejected a proposal to make the Puerto Ricans citizens of the United States, lest there be any implication ‘that we were incorporating Puerto Rico into the Union . . . thus putting it in a state of pupilage for statehood.’” Cabranes, *Puerto Rico*, *supra* note 97, at 459 (citing 33 CONG. REC. 3037, 3554 (1900)); see also JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 42–43 (1997) [hereinafter TRÍAS MONGE, *PUERTO RICO*] (describing the political context surrounding the Foraker Act).

¹⁰² Fuentes-Rohwer, *Democratic Theory*, *supra* note 86, at 1537 (“Congress created that category expressly as another subordinate status, inferior to U.S. citizenship, and inferior explicitly because America’s political and intellectual leaders regarded Puerto Rico as not just a separate but as yet another unequal race, incapable of full self-governance.” (citing Smith, *Bitter Roots*, *supra* note 11, at 380)); see also Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 156

ported “an honorable and fruitful association” with Puerto Rico “accept[ed] the proposition that the United States could not and would not ‘incorporate the alien races, [or the] civilized, semi-civilized, barbarous, and savage peoples of [the] islands into [the U.S.] body politic.’”¹⁰³

In the *Insular Cases*,¹⁰⁴ a series of United States Supreme Court decisions addressing the status of the new U.S. territories, the Court established the constitutional basis for expanding the U.S. empire and governing its colonies without fully accepting colonial peoples.¹⁰⁵ In one of the leading cases, *Downes v. Bidwell*, the Court held that the Foraker Act’s imposition of duties on trade between Puerto Rico and the United States was constitutional, affirming Congress’s power to treat the islands acquired from Spain—the “unincorporated” territories—differently from the “incorporated” territories.¹⁰⁶ Unlike incorporated territories, unincorpo-

(“Puerto Rico’s population, ‘composed of a mixture of Negro, Indian, and Spanish ancestry . . . rendered the island incapable of independent self-government’ in the eyes of Americans.” (quoting RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM* 184 (1972))).

¹⁰³ Cabranes, *Citizenship*, *supra* note 5, at 432 (citing 33 Cong. REC. 3622 (1900)).

¹⁰⁴ Rivera Ramos groups the *Insular Cases* into two main categories: the 1901 cases and those that followed. The 1901 cases include: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); and *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 240–41. The later cases include *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *González v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendezona v. United States*, 195 U.S. 158 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Grafton v. United States*, 206 U.S. 333 (1907); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Kopel v. Bingham*, 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernández*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914); and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *Id.*

¹⁰⁵ See Cabranes, *Puerto Rico*, *supra* note 97, at 458–60. “The [Foraker Act and the *Insular Cases*] put the United States in charge of Puerto Rico and gave the imperial power effective control over all aspects of the government of the island.” *Id.* at 459; see also Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 242 (explaining that the *Insular Cases* addressed the status of the new territories, any constitutional limitations imposed on Congress in governing the territories, and the rights of the territories’ inhabitants).

¹⁰⁶ In *Downes v. Bidwell* a customs collector attempted to collect duties on trade between Puerto Rico and the continental states, arguing that Puerto Rico was a “foreign country” under the tariff laws. *Downes v. Bidwell*, 182 U.S. at 247–48. If Puerto Rico was a “part of” the United States, then tariffs had to comply with the United States Constitution’s Uniformity Clause. Román & Simmons, *supra* note 81, at 459. The Brown majority concluded that the Uniformity Clause did not apply to the territories: “[T]he island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution.” *Downes*, 182 U.S. at 287. Thus, the Foraker Act was constitutional, and goods entering the United States from Puerto Rico were subject to duties. *Id.* Another key issue in

rated territories, like Puerto Rico, “belong[ed] to” but were “not a part of” the United States¹⁰⁷—they were never expressly or impliedly promised statehood, they were excluded from congressional enactments that applied to the states, and their inhabitants were entitled to nothing more than “fundamental” constitutional protections.¹⁰⁸ As Judge Juan Torruella later recognized, “through the *Insular Cases*, the Supreme Court placed its imprimatur on a colonial relationship in which Congress could exercise virtually unchecked power over the unincorporated territories ad infinitum.”¹⁰⁹

As many scholars have observed, the Supreme Court, like other decision-making bodies at the time, worried that Puerto Rico’s “racially different others” threatened the very heart of white Anglo-Saxon dominance.¹¹⁰ Justice Brown’s majority opinion in *Downes* warned that the offspring of the colonies’ inhabitants, “whether savages or civilized,” would become citizens “entitled to all the rights, privileges and immuni-

Downes involved the reach of the U.S. Constitution to the U.S. territories. The Brown majority held that the U.S. Constitution did not fully apply to the territories’ inhabitants. Román & Simmons, *supra* note 81, at 460. Instead, it “applied to the territories only to the degree that it was extended to them by Congress.” Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 247; see also Cabranes, *Citizenship*, *supra* note 5, at 436 (“[A]lthough the specific legal questions involved the imposition of customs duties,” the Supreme Court “upheld the power of Congress to treat the islands acquired from Spain differently from the ‘incorporated territories.’ . . . [A]nd gave judicial approval to the birth of ‘the American Empire.’”).

¹⁰⁷ *Downes*, 182 U.S. at 287; see also Smith, *Bitter Roots*, *supra* note 11, at 378 (“The ‘incorporated/unincorporated’ distinction was really a distinction between territories with populations racially qualified to be equal citizens and those racially fit only for lesser statuses.”); Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 291 (contending that the “doctrine of incorporation” reflects the prevailing practice of constructing the “‘other’ as a ‘separate,’ but subordinated identity” to justify unequal treatment).

¹⁰⁸ See Fuentes-Rohwer, *Democratic Theory*, *supra* note 86, at 1535–40. The reasoning in Justice White’s concurring opinion, which articulated the “incorporation” doctrine, eventually became the majority position of the United States Supreme Court. Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 247.

¹⁰⁹ Torruella, *Hacia Dónde Vas*, *supra* note 101, at 1509 (emphasis added); José A. Cabranes, *Some Common Ground*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 11, at 43 (“It is fair to say that [the territorial incorporation doctrine] was devised in order to make colonialism possible.”); Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 284–91 (outlining the “ideology of expansion” discourse in the *Insular Cases*); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985) [hereinafter TORRUELLA, *SEPARATE AND UNEQUAL*] (identifying the political, economic, social, and cultural consequences of the *Insular Cases*); Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1144–69 (2002) (contending that the ongoing application of the plenary power doctrine violates international law).

¹¹⁰ Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 158.

ties of citizens.”¹¹¹ “If such be their status,” he cautioned, “the consequences will be extremely serious.”¹¹² He thus concluded that nothing forbade Congress from exercising wide-ranging political power over those possessions “inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought.”¹¹³ This threat to the “American Empire” could be controlled only by conferring on Congress unfettered discretion.¹¹⁴

The 1917 passage of the Jones Act,¹¹⁵ which gave Puerto Ricans U.S. citizenship, also racialized Puerto Ricans as “different” and “other,” making political exclusion of the entire group appear necessary. Like earlier legislation, it “brought out the congressional construction of Puerto Ricans as being mostly of African descent and, thus, belonging to ‘an inferior race,’ which made incorporation into the United States as a state impossi-

¹¹¹ *Downes*, 182 U.S. at 279.

¹¹² *Id.* Justice Brown warned that “grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production . . .” *Id.* at 282. Justice White, in concurrence, also cautioned that incorporating the distant territories could confer “the immediate bestowal of citizenship on those absolutely unfit to receive it” and “would ‘strip [the United States] of all power to protect the birthright of its own citizens.’” *Id.* at 306 (White, J., concurring); see also Román, *Alien-Citizen Paradox*, *supra* note 15, at 22 (noting that Justice White justified vast Congressional discretion over Puerto Rico “by maintaining that the ‘evil of immediate incorporation’ would open up the borders to ‘millions of inhabitants of alien territory’ who could overthrow ‘the whole structure of the government’”) (citations omitted).

¹¹³ *Downes*, 182 U.S. at 287; see also Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 157 (observing that the Court “feared ‘extremely serious’ consequences if citizenship were conferred upon ‘savages’”). Rivera Ramos asserts that the *Insular Cases* reflected a related “discourse that stresse[d] the separateness between the conquering people and the conquered.” Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 290. Indeed,

[t]he “other” is always inferior, less capable, predestined, of course, to be governed, to be held in tutelage, to be “civilized” or “protected,” to be brought within the ideological world of the dominating power, but sufficiently at a distance so as not to confuse the respective communities they inhabit; in short . . . to be kept at the same time “within and without” the Constitution.

Id. at 291 (citation omitted).

¹¹⁴ See Rivera Ramos, *supra* note 14, at 300 (“The doctrine developed in the *Insular Cases* . . . produced an authoritative rationale for the claim that Congress could exercise almost unrestricted power over the peoples of the territories, maintaining them in a situation of subordination. In this sense the cases represented the effort to legitimate—through discursively validated claims—a particular power relationship.”). As Juan Perea has asserted, “[p]lacing the political fate and identity of Puerto Ricans in the discretion of Congress guaranteed that racism would play a major role in shaping that fate.” Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 159. For an extensive analysis of the *Insular Cases* and their role in the construction of Puerto Rican identity, see generally RIVERA RAMOS, *LEGAL CONSTRUCTION OF IDENTITY*, *supra* note 14. For a detailed discussion of *Downes*, in particular, see generally Malavet, *The Story of Downes v. Bidwell*, *supra* note 14.

¹¹⁵ Jones Act, ch. 145, § 5, 39 Stat. 951 (1917).

ble for some legislators.”¹¹⁶ Additionally, as Rivera Ramos notes, U.S. citizenship for Puerto Ricans “did not efface colonialism . . . it was meant to consolidate it, to make it more palatable, and to make those subject to it more easily governable.”¹¹⁷ Puerto Ricans were thus “legally constructed, by statute and constitutional opinion, as ‘Others’ relative to the United States, and their citizenship as expressly inferior, i.e., second class.”¹¹⁸

These views played a vital role in the formation of colonial policies that kept the newly acquired territory of Puerto Rico—and its people—outside of the U.S. polity. This larger story of Puerto Rican racialization is undergirded by a significant but little-known back story of colonization from thousands of miles away—grown out of Hawai‘i’s sugar cane fields, where Puerto Rican laborers suffered lasting abuse at the hands of powerful plantation owners and collusive government authorities.

B. PUERTO RICANS IN HAWAI‘I: THE HISTORICAL SETTING

When the first shipload of Puerto Ricans docked in Hawai‘i in 1900, Westerners controlled nearly all aspects of Hawai‘i’s economic and political life.¹¹⁹ Throughout the mid-1800s, Europeans and Americans engi-

¹¹⁶ Malavet, *Cultural Nation*, *supra* note 13, at 30; *see also id.* at 52 n.221 (“During the Congressional debate on the 1917 Organic Act for Puerto Rico, United States Representative Joseph Cannon stated that the ‘the [sic] racial question’ made the Puerto Ricans ineligible for statehood and made them suspect as ‘people competent for self-government.’”); Román, *Alien-Citizen Paradox*, *supra* note 15, at 25 (“I really had rather [Puerto Ricans] would not become citizens of the United States. I think we have enough of that element in the body politic already to menace the Nation with mongrelization.” (citing 54 CONG. REC. 2250 (1917) (statement of Sen. Vardaman))).

¹¹⁷ RIVERA RAMOS, *LEGAL CONSTRUCTION OF IDENTITY*, *supra* note 14, at 156 (noting that, because United States citizenship for Puerto Ricans is separate from their right to political participation, by conferring citizenship on Puerto Ricans, the United States was able to strengthen its legal and political position in Puerto Rico while keeping Puerto Rico’s people subordinate); *see also* Rivera Ramos, *Deconstructing Colonialism*, *supra* note 90 at 108 (“Detaching citizenship from the right of political participation[—]as in the case of the residents of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, and the Virgin Islands[—]has become a central feature of the legal framework of the American colonial enterprise. . . . [and has] allowed for a new construction of the ‘other’ . . .”).

¹¹⁸ Malavet, *Cultural Nation*, *supra* note 13, at 31–32; *see also* RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946*, at 204 (1972) (“In the final analysis, race emerged as the determining factor in establishing policy. That policy assumed that the Puerto Ricans were radically different from the Anglo-Saxons and were unassimilable into the American body politic.”).

¹¹⁹ *See* LAWRENCE H. FUCHS, *HAWAII PONO: AN ETHNIC & POLITICAL HISTORY 152–53* (1961) (“For forty years, Hawaii’s oligarchy skillfully and meticulously spun its web of control over the Islands’ politics, labor, land, and economic institutions, without fundamental challenge.”). The industry was tightly controlled by five former missionary families-turned-multinational corporations, known as “The Big Five.” COOPER & DAWS, *supra* note 19, at 3. The

neered a massive land grab, opening the door to an unprecedented shift in power.¹²⁰ Advisors to King Kamehameha III orchestrated the Māhele, which converted the use of Native Hawaiian communal lands into a Western private-property system.¹²¹ That process allowed white planters and ranchers to acquire fee title to most of Hawai‘i’s non-government lands.¹²² Hawaiian lands were divided, confiscated, and sold away. Plantations diverted water from agrarian Hawaiian communities.¹²³ Native Hawaiians were separated from the land, thereby severing cultural and spiritual connections.¹²⁴

Big Five eventually gained control over nearly every aspect of Hawai‘i’s economy, including shipping, importing, and banking. NOEL J. KENT, *HAWAII: ISLANDS UNDER THE INFLUENCE* 80–81 (1993).

¹²⁰ See NATIVE HAWAIIAN RIGHTS HANDBOOK 6 (Melody Kapilialoha MacKenzie ed., 1991); Jon M. Van Dyke, *Population, Voting, and Citizenship in the Kingdom of Hawai‘i*, 28 U. HAW. L. REV. 81, 83 (2005).

¹²¹ See JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, *DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887*, 44–50 (2002).

¹²² See VAN DYKE, *supra* note 3, at 38–41, 50–51; NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* 42–43 (2004). Although the goal was to divide the lands into equal shares (between the monarchy, the chiefs, and the commoners), the common people received only a very small amount. See VAN DYKE, *supra*, at 5–6. Kauikeaouli (King Kamehameha III) authorized the Māhele partly as a preemptive effort to preserve Hawaiian title to land in the event of a foreign takeover. See *id.* at 9; see also B. Kamana-maikalani Beamer, *Na Wai Ka Mana? □Oiwī Agency and European Imperialism in the Hawaiian Kingdom* 201 (Aug. 2008) (dissertation, University of Hawai‘i) (contending that the Māhele was an institution “created through the authority of Kauikeaouli and the ali‘i [royalty] of his the time . . . [that] attempted to get people back on the land so that cultivation might again thrive by granting them title to lands”); OSORIO, *supra* note 121, at 46–47 (“Historians and economists have concluded that the Māhele, whether a huge political fiasco or a devious theft, disinherited the vast majority of the kanaka.”).

¹²³ See OSORIO, *supra* note 121, at 185; see also D. Kapua‘ala Sproat, *Water, in THE VALUE OF HAWAII‘I: KNOWING THE PAST, SHAPING THE FUTURE* 189 (Craig Howes & Jonathan Kay Kamakawiwoole Osorio, eds. 2010). For countless years, Native Hawaiians viewed Hawai‘i’s fresh waterways as sacred and as physical embodiments of Kāne, one of the Native Hawaiians’ principal gods. Sproat, *supra*, at 189. Before Western contact, Hawaiians used fresh water for drinking, establishing complex ecosystems, and supporting estuaries, fisheries, native agriculture, and aquaculture. *Id.* at 188–89. Like land, the sugar planters viewed water as a private commodity that could be owned and controlled. As such, they constructed extensive ditch systems to capture stream water for private benefit, depriving Native Hawaiians of a crucial spiritual, cultural, and physical life force. *Id.* at 189–90.

¹²⁴ See Melody Kapilialoha MacKenzie, Susan K. Serrano & Koalani Laura Kaulukukui, *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 NAT. RESOURCES & ENV’T 37, 37 (Winter 2007). For Native Hawaiians, the land, or ‘āina, is not a mere physical reality; instead, it is an integral component of Native Hawaiian social, cultural, and spiritual life. See *id.* Like many indigenous peoples, Native Hawaiians see an interdependent, reciprocal relationship between the gods, the land, and the people. *Id.* In stark contrast to the Western notion of privately held property, Hawaiians did not conceive of land as exclusive and alienable, but instead communal and shared. *Id.* The land, like a cherished relative, cared for the Native Hawaiian people and, in return, the people cared for the land. *Id.*; see also SILVA,

Private land ownership and the Reciprocity Treaty of 1875—which lifted tariffs on Hawai‘i-grown sugar exported to the United States—paved the way for massive sugar plantations and impending U.S. control.¹²⁵ Desperate for cheap labor to support large-scale sugar production, planters began importing “plodding Chinese coolie[s]”¹²⁶ under low-wage contracts.¹²⁷ To induce competition and deep racial divisions, planters shipped in workers from Japan and Portugal, and later, from Korea, Puerto Rico, the Philippines, and even the U.S. South.¹²⁸ Important to this enterprise was the Westerners’ belief in their racial superiority and “the notion that the white race could not perform labor under the difficult conditions

supra note 122, at 39 (“[T]he people took care of the land in what they conceived of as a reciprocal relationship.”); LILIKALĀ K. KAME‘ELEIHIWA, *NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AĪ? HOW SHALL WE LIVE IN HARMONY?* 25–29, 305 (1992) (describing traditional Hawaiian society).

¹²⁵ See VAN DYKE, *supra* note 3, at 118–20, 155; Hawai‘i State Advisory Committee to the U.S. Commission on Civil Rights, *Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting Native Hawaiians* 5–6 (2001) [hereinafter *Reconciliation at a Crossroads*]; NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 120, at 11 (explaining the 1887 renewal of the 1875 Reciprocity Treaty); VAN DYKE, *supra* note 3, at 39 (describing foreign landowners’ rapid acquisition of choice lands to grow sugar).

¹²⁶ See Third Report of the Commissioner of Labor on Hawaii, H.R. Doc. 59-580, at 62 (1905) [hereinafter Third Report 1905].

¹²⁷ BEECHERT, *supra* note 21, at 37–41, 59–60, 62–63; RONALD T. TAKAKI, PAU HANA: PLANTATION LIFE AND LABOR IN HAWAII, 1835–1920, at 22 (1983) [hereinafter TAKAKI, PAU HANA]. The Native Hawaiian population had plummeted precipitously from foreign disease (from estimates of 400,000 to 1,000,000 at the time of the first European contact in 1778 to less than 40,000 a century later). See Nolan J. Malone, *Laupa‘i Kānaka: Native Hawaiian Population Forecasts for 2000 to 2050*, PROJECT MUSE, http://muse.jhu.edu/login?uri=/journals/contemporary_pacific/v019/19.1kauanui.html2–3 (2005); Bradley E. Hope & Janette Harbottle Hope, *Native Hawaiian Health in Hawaii: Historical Highlights*, 1 CAL. J. HEALTH PROMOTION 1, 2 (Dec. 2003), <http://www.csuchico.edu/cjhp/1/hawaii/01-09-hope.pdf>. When the sugar planters attempted unsuccessfully to coerce Native Hawaiians to work on the oppressive plantations, BEECHERT, *supra* at 23–24, 40, the *Pacific Commercial Advertiser* urged the enforcement of the vagrancy law to snare more Hawaiian laborers: “If only we could compel our idlers, loafers or vagrants . . . to work, for their own good, and for the good of the kingdom, we would at once have a supply of perhaps 5,000 able-bodied men and women,” TAKAKI, PAU HANA, *supra*, at 22. A law was also enacted to prohibit emigration to stem the numbers of Hawaiians moving to California to work. See *id.* Some Ali‘i feared the decline in Hawaiian numbers and sought to bring in “a ‘cognate’ population which could intermarry with the declining Hawaiian population and increase their numbers” to prevent annexation by a major power. See BEECHERT, *supra* at 61.

¹²⁸ ANDREW W. LIND, *HAWAII’S PEOPLE* 4 (4th ed. 1990) (“The need for effective labor control . . . dictated a policy of drawing the workers from a number of different sources . . .”). In 1850, in an attempt to cure Native Hawaiian “idleness” and to fill the need for large quantities of labor, the legislature enacted the Master and Servants Act, a far-reaching labor law that established contract labor in Hawai‘i. BEECHERT, *supra* note 21, at 42–45.

of tropical and subtropical plantations.”¹²⁹ Plantation owners used physical force and tight economic control to dominate workers.¹³⁰ The stage was set for what would become a highly racially stratified plantation system throughout the 1900s.¹³¹

In 1887, a secret society made up mostly of white American and European business interests—and supported by an all-white 500-man militia—forced King David Kalākaua to accept major changes in Hawai‘i’s governmental structure that effectively terminated most of the king’s political power.¹³² That same year, the United States obtained exclusive use of Pearl Harbor.¹³³ Then, in 1893, Western missionaries-turned-businessmen illegally overthrew the sovereign Hawaiian nation, with direct U.S. military support.¹³⁴

¹²⁹ BEECHERT, *supra* note 21, at 40.

¹³⁰ TAKAKI, PAU HANA, *supra* note 127, at 66–75.

¹³¹ *Id.* at 76.

¹³² *Reconciliation at a Crossroads*, *supra* note 125, at 5. The “Hawaiian League,” as it was called, was founded by many of the same individuals who later orchestrated the overthrow of the Hawaiian nation. VAN DYKE, *supra* note 3, at 121. The resulting “Bayonet Constitution” gave almost complete political control to white, Western interests. *See* OSORIO, *supra* note 121, at 197. Its new property and income requirements largely disenfranchised Native Hawaiian voters, while giving white voters and foreigners disproportionate political power. *See* RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM VOLUME III: 1874–1893 THE KALAKAUA DYNASTY 369–72 (1967); *see also* VAN DYKE, *supra* note 3, at 145–46. Strict ancestry requirements limited the vote to those of “Hawaiian, American or European birth or descent.” *Id.* at 145. Asians, therefore, could not vote, even if they naturalized. *Id.* at 147. This requirement was designed to allow the 10,000 Portuguese laborers to vote because it was widely believed that they would support the oligarchy’s interests. *Id.* *See also* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 120, at 11 (discussing the 1887 Bayonet Constitution, which “not only limited the monarch’s prerogatives but resulted in too much power being placed in the hands of Westerners”).

¹³³ VAN DYKE, *supra* note 3, at 126–27; *Reconciliation at a Crossroads*, *supra* note 132, at 5–6.

¹³⁴ *See* Serrano et al., *Restorative Justice*, *supra* note 77. In 1895, the beloved former Queen Lili‘uokalani was imprisoned for misprision of treason. LYDIA KAMAKA‘EHA LILI‘UOKALANI, HAWAII’S STORY BY HAWAII’S QUEEN 289 (1990). President Cleveland’s emissary, James Blount, investigated the United States’ role in the overthrow and found it to be a stark violation of international law. *See* S.J. Res. 19, Pub. L. No. 103-150, 107 Stat. 1510 (1993). President Cleveland declared the overthrow improper, calling it an “act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress.” S.J. Res. 19, Pub. L. No. 103-150, 107 Stat. 1510 (1993). In response to President William McKinley’s 1897 signing and submission of a treaty of annexation to Congress for ratification, 38,000 Native Hawaiians—nearly all of the adult Native Hawaiian population—mobilized and signed a petition to Congress condemning the annexation. SILVA, *supra* note 122, at 151; Noenoe K. Silva, *Kanaka Maoli Resistance to Annexation*, 1 ‘ŌIWI: A NATIVE HAWAIIAN J. 40 (1999).

American military and plantation owners lobbied hard for annexation, alternatively characterizing indigenous Hawaiians as uncivilized or childlike—in either case, in need of United States control.¹³⁵ With a military base at Pearl Harbor and sugar at stake, the United States annexed Hawai'i in 1898 and took control of the provisional government as well as all former Hawaiian government and royal lands.¹³⁶

As Memmi's framework predicts, race was key in legitimizing the planters' confiscation of land, destruction of Hawaiian culture and self-governance, and exploitation of labor of color from around the globe.¹³⁷ While the planters "used race to legitimize conquest, denigrating, in racial terms, those colonized,"¹³⁸ it also sought to civilize those colonial people "through the acquisition of [W]estern values and work discipline."¹³⁹ Into this racialized political economy, five thousand Puerto Rican workers entered.

In the early 1900s, cheap labor was in desperate demand: Hawai'i's annexation to the United States halted importation of Chinese and alien contract laborers,¹⁴⁰ and Japanese laborers were considered overly "de-

¹³⁵ See KAME'ELEIHIWA, *supra* note 124, at 305 (Hawaiians characterized as "ignorant Natives"); SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* 139 (2000) ("paternalistic racism" characterized Native Hawaiians as "childlike, benign, and foolish"); SILVA, *supra* note 122, at 51–54, 59–61, 72–73 (explaining that Hawaiians were described as "lazy," "savage," "barbaric," "degraded," "ignorant," "incompetent," and "inferior"). Missionaries, the precursors to the planters and businessmen, generally believed that Hawaiians were "indolent," and that their "sickness and death [were] often the result of [their] improvidence." BEECHERT, *supra* note 21, at 41. Thus, it was necessary to "save" them "by introducing them to the discipline of work—the opposite of sin as evidenced in idleness." *Id.*

¹³⁶ See Serrano, et al., *Restorative Justice*, *supra* note 77, at 208. Some scholars contest the legitimacy of the "annexation." See, e.g., David Keanu Sai, *American Occupation of the Hawaiian State: A Century Unchecked*, 1 HAWAIIAN J. OF L. & POL. 46 (2004).

¹³⁷ See BEECHERT, *supra* note 21, at 40–41 (describing how the notion of white racial superiority contributed to the recruitment of low wage foreign labor in Hawai'i).

¹³⁸ Yamamoto & Betts, *supra* note 24, at 558 (citing ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (expanded ed. Beacon Press 1991) (1971)).

¹³⁹ BEECHERT, *supra* note 21, at 40 (citing RALPH KUYKENDALL, *THE HAWAIIAN KINGDOM, 1778–1854: FOUNDATION AND TRANSFORMATION* 171 (1938)).

¹⁴⁰ The Chinese Exclusion Act of 1882, which was extended to the new Territory of Hawai'i, prohibited the entry of Chinese to the United States. TAKAKI, PAU HANA, *supra* note 127, at 25; ANGELO N. ANCHETA, *RACE, RIGHTS AND THE ASIAN AMERICAN EXPERIENCE* 25 (1998); Raquel Aldana & Sylvia R. Lazos Vargas, Essay, "Aliens" In Our Midst Post-9/11: *Legislating Outsideness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1693 (2005) (noting that the Chinese Exclusion Act was passed "on the grounds that [Chinese were] 'disreputable,' 'dangerous and degrading,' and akin to 'lepers'" (citing BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (Mapping Racisms Series 2003))). The Foran Act, also called the "1885 Alien Contract Labor Law," prohibited immigrants from entering the United States to work under labor contracts. See 23 Stat. 332 (1885); Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1605 (2005). The Foran Act became appli-

manding.”¹⁴¹ The planters thus found a solution in “Porto Ricans and . . . Negroes from the Southern States.”¹⁴² With false promises of high wages and a Spanish-speaking destination, the plantation owners recruited Puerto Ricans to work as cheap labor and strike-breakers¹⁴³ in Hawai‘i’s cane fields.¹⁴⁴ In 1900, the first shipload of Puerto Ricans arrived in the Territory of Hawai‘i.¹⁴⁵ Most were victims of the 1899 San Ciriaco hurricane that decimated acres of homes and farmland in Puerto Rico.¹⁴⁶

For the powerful white plantation oligarchy, Puerto Ricans were easy targets in the high-stakes sugar industry. The Treaty of Paris between the United States and Spain, which ended the Spanish-American War in 1898, did not confer citizenship on the “native inhabitants” of Puerto Rico,¹⁴⁷ and the 1900 statute establishing a civil government in Puerto Rico described them as “citizens of Porto Rico”—not citizens of the United

cable to Hawai‘i on June 15, 1900, the day after Hawai‘i was officially annexed to the United States. See BEECHERT, *supra* note 21, at 117. The number of Chinese laborers was already steadily declining because of the “tendency of the average Mongolian to return to his native land when he has accumulated sufficient money to constitute a competency or to engage in business in his own country[.]” Report of the Commissioner of Labor on Hawaii, 1901, S. Doc. 57-169, at 19 (1902) [hereinafter Report of the Commissioner, 1901].

¹⁴¹ See TAKAKI, PAU HANA, *supra* note 127, at 150–51; see also *Porto Ricans Arrive*, HAWAIIAN STAR, Dec. 24, 1900, at 1 (“We cannot depend entirely upon the Japanese for they get ‘uppish’ and go on strikes too frequently.”).

¹⁴² See Report of the Commissioner, 1901, *supra* note 140, at 19. See also REPORTS OF THE IMMIGRATION COMMISSION: ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION OF 1910, 61st Congress, 3rd Session, Vol. 1, at 702 (1911).

¹⁴³ See Report of the Commissioner, 1901, *supra* note 140, at 32 (“The regular arrival of monthly expeditions of Puerto Rican laboring people throughout an entire year largely disabused [the Japanese] of this sense of monopoly and made them much more reasonable in their relations with their employers.”); *Porto Ricans To Be Imported*, L.A. TIMES, June 6, 1900, at 12 (the “troubles with the Japs” led sugar planters to seek workers from Puerto Rico); Carr, *Image*, *supra* note 2, at 103 (observing that the sugar planters brought Puerto Ricans to Hawai‘i to pose “a threat to the other nationalities on the plantations, especially the Japanese”).

¹⁴⁴ See Norma Carr, *The Puerto Ricans in Hawaii: 1900-1958*, at 99–100 (Dec. 1989) (unpublished Ph.D. dissertation, University of Hawai‘i) (on file with author) [hereinafter Carr, *The Puerto Ricans*] (describing *San Francisco Examiner* report on promises made to Puerto Rican laborers en route to Hawai‘i); see also Ronald D. Arroyo, *Da Borinkees: The Puerto Ricans of Hawaii* (July 1977) (unpublished Ph.D. dissertation, Union Graduate School) (on file with author); *Seek Porto Ricans for Hawaiian Plantations*, PAC. COM. ADVERTISER, Aug. 2, 1900, at 1 (reporting that plantation recruiters offered free transportation, houses, schools and medical attention). But the planters worried that the new workers would be unable—unlike the Mongolians—“to adjust themselves quickly to new environments,” which would “stand[] in the way of their immediate usefulness.” *Id.* at 15–16.

¹⁴⁵ Carr, *The Puerto Ricans*, *supra* note 144, at 61. Between 1900 and 1901, eleven shiploads of Puerto Ricans landed in Hawai‘i. BEECHERT, *supra* note 21, at 129.

¹⁴⁶ See Malavet, *The Story of Downes v. Bidwell*, *supra* note 14, at 125.

¹⁴⁷ Treaty of Paris, *supra* note 6, at 1759.

States.¹⁴⁸ In 1904, the United States Supreme Court ruled that Puerto Ricans were not “alien immigrants” and could not be barred from entering the United States, but the Court declined to say what the citizenship status of Puerto Ricans really was.¹⁴⁹ This ambiguity in citizenship and its attendant rights and privileges gave authorities license to treat Puerto Ricans arbitrarily, and oftentimes, unfairly.¹⁵⁰ Indeed, Hawai‘i’s sugar barons used Puerto Ricans’ ambiguous citizenship to their advantage. As early as 1900, Puerto Rican workers bound for Hawai‘i entered the United States through New Orleans as “citizens”—with the help of a special immigration official sent to facilitate the process.¹⁵¹ The sugar planters also wielded power in Washington, D.C., where they successfully lobbied for labor and immigration policies beneficial to the sugar industry in Hawai‘i.¹⁵²

Even the recruitment of the early Puerto Ricans was highly racialized. The recruiting agents “ha[d] orders to enlist no Spaniards, and no blacks of unmixed blood [we]re taken, the idea being, presumably, to have the men marry Hawaiian women and thus lose their identity with Porto Rico.”¹⁵³ Those agents “continually scour[ed] the hills and interior dis-

¹⁴⁸ Foraker Act, 31 Stat. 177.

¹⁴⁹ Burnett, *supra* note 36, at 661 (citing *Gonzales v. Williams*, 192 U.S. 1, 12 (1904)).

¹⁵⁰ *Id.* at 689–91. “[T]he ambiguous status imposed upon Puerto Ricans and Filipinos . . . placed them in an uncertain position with respect to a wide range of rights and privileges arising out of statutes, regulations, and other rules, leaving their fate to be decided on a case-by-case basis.” *Id.* at 690–91; see also Charles R. Venator Santiago, *Race, Space, and the Puerto Rican Citizenship*, 78 DENV. U.L. REV. 907, 907–08 (2001) (highlighting contradictions in Puerto Ricans’ ambiguous citizenship).

¹⁵¹ This was key because the new Territory of Hawai‘i was bound by the Foran Act, which prohibited the importation of foreign contract labor, and by the Chinese Exclusion Act, which prohibited the importation of Chinese laborers. See Report of the Commissioner, 1901, *supra* note 140; *Porto Ricans Classed As American Citizens*, DAILY PICAYUNE, Dec. 1, 1900, at 6; *To Enter Hawaii: Puerto Ricans May Come and Go*, PAC. COM. ADVERTISER, Dec. 10, 1900, at 1 (“The authorities [in New Orleans] took the position that Porto Ricans are people of the United States, and therefore not subject to the restrictions placed on foreign immigrants by the immigration law, which shuts out all contract labor. It was admitted the Porto Ricans came to this country under contract, and the only issue was as to their rights as American citizens. The Immigration Bureau has decided this in their favor.”); see also Carr, *Image*, *supra* note 2, at 97.

¹⁵² See *infra* note 280.

¹⁵³ *The Porto Rican Exodus*, *supra* note 143, at 12. See also *The Coming Porto Ricans: Eight Hundred and Thirty-Nine in the Californian’s Steerage*, PAC. COM. ADVERTISER, Apr. 19, 1901, at 5; *Porto Ricans To Be Imported*, L.A. TIMES, Jun. 6, 1900, at 12 (“Everyone except the planters is opposed to importing the Porto Ricans, as it is argued they will increase the race problem, since only the lowest class would come.”). In 1905, the Hawai‘i Territorial Legislature established a territorial board of immigration to promote white settlement in Hawai‘i. Labor Commissioner Report of 1901, *supra* note 126, at 422.

tricts of Porto Rico, enlisting all who will go, negroes rejected as much as possible."¹⁵⁴

Guarded by men armed with shotguns to prevent escape, the Puerto Ricans were taken from New Orleans across the country to California, and from there, by steamer to Honolulu. Even their transit across the United States was described in highly racialized terms: according to reports, they were transported under "slavelike conditions."¹⁵⁵ The circumstances were reportedly so unbearable that, when the second shipload stopped in San Francisco, the Puerto Rican passengers were rescued by the *San Francisco Examiner*.¹⁵⁶ Even while the *Examiner* admonished the planters for kidnapping and treating the Puerto Ricans harshly, it contended that the Puerto Ricans' inherent immaturity, ignorance, and disorganization enabled the planters to dupe them in the first place.¹⁵⁷ Those who arrived in Hawai'i were swiftly distributed to various plantations in order to prevent escape.¹⁵⁸

¹⁵⁴ *A Journey with the Porto Rican "Slaves" of Hawaii*, PAC. COM. ADVERTISER, July 16, 1901 [hereinafter *Porto Rican "Slaves" of Hawaii*].

¹⁵⁵ BEECHERT, *supra* note 21, at 129 ("Charges of slavelike conditions, abuse, and kidnapping followed the Puerto Ricans across the country."); see also Souza, *supra* note 80, at 166-67; *Coolie Traffic*, L.A. TIMES, Jun. 29, 1901, at 8 ("[T]he fact that [the Puerto Ricans] are hustled through . . . in the night-time, and are stowed away in a steamship at the end of the long wharf . . . something after the fashion in which negroes were shipped by stealth from the coast of Africa to this country in early days, has caused an impression to get abroad that the traffic is more or less illegal, and that the Porto Ricans are being sent off to the islands, not exactly against their will, but without a full knowledge of the conditions that they are going to meet.").

¹⁵⁶ *Hawaiian Investigation, Part 2: Hearing Before S. Comm. on Pac. I. and P.R.*, 57th Cong. 211 (1902) [hereinafter *Hawaiian Investigation*] (testimony of Judge Abram S. Humphreys).

¹⁵⁷ Edward J. Livernash, *Record-Breaking Run to be Made by Exile Train*, S.F. EXAMINER, Dec. 13, 1900, at 1. The newspaper painted Puerto Ricans as lazy and ignorant:

These Porto Ricans are by heredity irresolute. They are temperamentally prone to postpone every difficult duty. . . . In that they are strikingly Spanish. . . . [T]hey are temperamentally gay, light hearted—looking trouble in the face only spasmodically as a rule. In this they are strikingly like our Southern negroes. . . . [T]hey are densely ignorant of our laws, can speak no language but Spanish, and[] . . . have only an extremely vague notion of what they ought to do to accomplish their great desire—escape from the men who have deceived them. Another point worthy of attention in this regard is their want of organization, their mob-like qualities. They do not comprehend the need of concert of action any more than untrained children would comprehend.

Id.

¹⁵⁸ BEECHERT, *supra* note 21, at 130.

C. A “WRETCHED LOT”: RACIALIZATION TO SUBORDINATE PUERTO RICANS IN HAWAI‘I

Upon arrival, through plantation-controlled media, the sugar oligarchy strategically characterized Puerto Ricans as uncivilized and inferior to justify the laborers’ oppression and exclusion from the polity.¹⁵⁹ Albert Memmi’s four essential elements of racist-imperialism illuminate how the sugar oligarchy racialized Puerto Ricans to advance its social control strategy, further its economic interests, and justify harsh treatment in ways that solidified an enduring collective memory of Puerto Ricans.

1. Explicit Negative Characterizations

The media’s explicit negative characterizations of Puerto Rican laborers generally fell into three categories: (1) Puerto Ricans are desperate for work and thus need the sugar planters’ generosity to survive; (2) Puerto Rican culture and traditions are uncivilized; and (3) Puerto Ricans are physically and mentally inferior to whites.

a. *Puerto Ricans Are “Desperate” and “Lucky to Work on Hawai‘i’s Sugar Plantations”*

The newspapers in Hawai‘i depicted an impoverished Puerto Rico and starving Puerto Ricans desperate for work, implying that Puerto Ricans needed Hawai‘i’s plantations in order to survive. When the sugar planters began recruiting Puerto Rican laborers, Puerto Rico was recovering from a severe hurricane and, as a result, was experiencing extreme economic distress. Using this economic difficulty to their advantage, the plantation-controlled media pointed to this negative “difference” and assigned negative value to Puerto Rico and her inhabitants. The media reported that Puerto Rico was a “poverty-stricken” and “destitute island”¹⁶⁰ that was “exceedingly over-populated . . . [with] no work [for] . . . the vast army of unemployed.”¹⁶¹ The media also reported that “starvation in Porto Rico . . . left [the laborers] in a sadly depleted condition,”¹⁶² and referred to the laborers as “penniless peasants.”¹⁶³

¹⁵⁹ The sugar oligarchy similarly “create[d] any image necessary to maneuver its way through the political and economic relationships prevailing between national and island interests.” Carr, *Image*, *supra* note 2, at 102.

¹⁶⁰ *Porto Rican “Slaves” of Hawaii*, *supra* note 154.

¹⁶¹ *Porto Ricans on the Move*, PAC. COM. ADVERTISER, Apr. 4, 1901, at 12.

¹⁶² *Porto Ricans in These Islands*, PAC. COM. ADVERTISER, Sept. 17, 1901, at 1.

¹⁶³ *Porto Rican “Slaves” of Hawaii*, *supra* note 154.

The newspapers then highlighted Puerto Ricans' submission to the planters' fictitious promises to support the media's claims that Puerto Ricans were on the brink of demise. They cited Puerto Rican emigration to Hawai'i as "conclusive proof that want and even starvation do exist."¹⁶⁴ They called on readers to discount contradictory reports that Puerto Rico was "prosperous and comfortable," proclaiming that, "no man will leave his native land unless forced . . . by stress of circumstance."¹⁶⁵

The newspapers further used Puerto Rico's economic difficulty to praise the recruitment of Puerto Rican laborers, citing the emigration as "a blessing for Porto Rico"¹⁶⁶ and portraying the planters as humanitarians helping the hurricane-battered island. According to the *Pacific Commercial Advertiser*, the emigration was a "win-win" for the entire Puerto Rican populace: "Those . . . left behind have more opportunity to better themselves and those who emigrate, especially those who go to Hawaii will be given permanent employment."¹⁶⁷ The *Hawaiian Star* stated as "cold fact" that the planters offered the laborers employment and conditions "a great deal better in all respects than the Porto Ricans could get in [sic] their own island."¹⁶⁸ Even the *New York Times* portrayed the emigration as a desirable privilege, based on luck and hindered only by logistics: "200 men . . . wanted to go, but no more would fit on the ship."¹⁶⁹

b. Puerto Ricans Are "Uncivilized"

Condescending in their criticism of Puerto Rican customs, the plantation owners also characterized Puerto Ricans as uncivilized and desperately needing help—in the form of "Americanization." Consistent with Memmi's framework, the media spotlighted Puerto Ricans' "different habits of living,"¹⁷⁰ and assigned negative value to their diversion from the white "norm." As the first ship carrying Puerto Ricans was en route to Hawai'i, the *Pacific Commercial Advertiser* devoted an entire article, prominently on page two, to criticizing the Puerto Ricans' way of life. Nearly every sentence was rife with disapproval.¹⁷¹ The article's heading, "Ways of Puerto Rico: Topsy-turvy, so say Americans," and its thesis,

¹⁶⁴ *The Coming Puerto Ricans*, *supra* note 153, at 5.

¹⁶⁵ *Porto Rican Exodus*, *supra* note 153.

¹⁶⁶ *Porto Ricans on the Move*, *supra* note 161.

¹⁶⁷ *Id.*

¹⁶⁸ *The Porto Ricans*, HAWAIIAN STAR, Dec. 26, 1900, at 4.

¹⁶⁹ *The Porto Rican Exodus*, *supra* note 153.

¹⁷⁰ *Porto Rican "Slaves" of Hawaii*, *supra* note 154.

¹⁷¹ Carr, *Image*, *supra* note 2, at 97.

"its people should be marked with minus signs,"¹⁷² clearly set the stage for what followed. The reporters belittled every aspect of Puerto Rican life, insisting that "[e]verything upon the island is done in the wrong way,"—"the opposite of everything in the American code"—from the design of their homes,¹⁷³ gardens, and windows, to the way they wash their clothes.¹⁷⁴ Reporting that Puerto Ricans are "happy . . . when they have no money," the *Advertiser* debased Puerto Rican culture:

They are happy, contented and hungry when they have no money and they are as hungry, happy and contented when they have money. In fact, they never have money. . . . Contact with the Americans has aroused their cupidity but has not stimulated their activity. . . .

. . . [T]hey all go broke and they are all happy in their perennial poverty and content to absorb malarial plasmodia and suck sugarcane.¹⁷⁵

Other articles imposed missionary standards of piety on Puerto Ricans then denounced them for not conforming. Condemning leisure, the *Pacific Commercial Advertiser* referred to time spent not working as "idleness" and castigated the Puerto Ricans' social activities: "they give full rein to their passions, those for drink and gambling [They] [i]ndulge them to the full whenever they get any money."¹⁷⁶ Another *Advertiser* article condemned Puerto Ricans for diverging from the white oligarchy's pious dress code, criticizing the "men without hats," "women without shoes," "babies . . . without clothing," and boys wearing only pants.¹⁷⁷ The article further demeaned Puerto Ricans by calling them "superstitious," likely referring to Puerto Ricans' indigenous- or African-rooted religious practices.

¹⁷² *Ways of Porto Rico: Topsy-Turvy, So Say Americans*, PAC. COM. ADVERTISER, Dec. 12, 1900, at 2.

¹⁷³ *Id.* ("The backs of the houses, which are the real fronts, are in the front yard which is at the back, and the fronts of the houses, which are really the backs, face the alley which is called a street.").

¹⁷⁴ *Id.* According to the article, "[e]verything upon the island is the result of a struggle against nature and natural methods, from . . . the poorest little razorback pig, which for generations has been struggling to be a real hog, from the men who were once straight bred Indians, negroes or Spaniards, and are now all three, to the little, inch-through tomatoes which would be ruddy, succulent fruit if they had the least encouragement." *Id.*

¹⁷⁵ *Id.* A contextual reading of the white population's ideals and the article's tone and stance reveal the media warping healthy non-materialistic values into negative characteristics because they conflicted with the white oligarchy's capitalist framework. See Carr, *Image*, *supra* note 2, at 103 (asserting that "[t]he Puerto Rican was judged negatively for not being like the . . . Haole (Caucasian), a capitalist").

¹⁷⁶ *Concerns of Hawaii*, PAC. COM. ADVERTISER, Dec. 29, 1900 at 1.

¹⁷⁷ *Porto Rican "Slaves" of Hawaii*, *supra* note 154.

c. *Puerto Ricans Are "Physically and Mentally Inferior"*

Focusing on differences in physical appearance and demeanor, certain news articles portrayed Puerto Ricans as physically and mentally inferior to whites. In an extreme example, the *Pacific Commercial Advertiser* quoted a "prominent railroad man[']s" slew of insults, calling the laborers a "puny-squalid set," "the most miserable, ill-conditioned people he ever saw," "consumptives," "listless, dull, indifferent," and "without life."¹⁷⁸ Referring directly to race, he proclaimed that Puerto Ricans were "a mongrel breed" and that "intermarriage ha[d] so evidently depleted their vitality" that he could not "see how they ha[d] the stamina enough to live."¹⁷⁹ Other articles characterized Puerto Ricans as "enervated,"¹⁸⁰ having "weakening diseases,"¹⁸¹ and not "sturdy."¹⁸² They proclaimed Puerto Ricans were "timid and ignorant[,]. . . easily imposed upon and subdued,"¹⁸³ "submissive,"¹⁸⁴ and "idle and lazy."¹⁸⁵ A U.S. Labor Commissioner Report echoed these characterizations, calling newly arrived Puerto Ricans the group with "the least promise, either as citizens or laborers, of any immigrants that ever disembarked at Honolulu."¹⁸⁶ They were "miserable" and "filthy,"¹⁸⁷ and were "so ignorant of the first principles of life that they hardly knew how to eat."¹⁸⁸ Together, such explicit remarks eventually played a significant role in constructing the image of a desperate, uncivilized, and lesser race worthy only of harsh treatment and exclusion.

¹⁷⁸ *Wretched Lot*, *supra* note 1.

¹⁷⁹ *Id.*

¹⁸⁰ *Judge Humphreys Attacks Sugar Interests of Hawaii*, *supra* note 99.

¹⁸¹ *Negroes Had Cabins*, HAWAIIAN STAR, Jan. 17, 1901; *see also Porto Ricans Land as American Citizens*, L.A. TIMES, Dec. 2, 1900, at 12; *Laborers for Hawaii*, L.A. TIMES, Jan. 5, 1901, at 2 (describing group of Puerto Ricans bound for Hawai'i as "a sickly, degenerate, weak and disgusting lot"); Carr, *Image*, *supra* note 2, at 100 (observing that "many [articles] were about the poor health and diseased condition of the newcomers").

¹⁸² *The Porto Rican Exodus*, *supra* note 153.

¹⁸³ *Judge Humphreys Attacks Sugar Interests of Hawaii*, *supra* note 99.

¹⁸⁴ *Id.*

¹⁸⁵ *Ways of Porto Rico*, *supra* note 172.

¹⁸⁶ Report of the Commissioner, 1901, *supra* note 140, at 25.

¹⁸⁷ *Hawaiian Investigation*, *supra* note 156, at 209 (testimony of Judge Abram S. Humphreys) (quoting HONOLULU ADVERTISER, Jan. 17, 1901) ("[m]isery and filth were no strangers" to the Puerto Ricans); *see also Porto Ricans on Colon*, HAWAIIAN STAR, May 14, 1901, at 4 ("dirt and filth has come to be recognized as one of the most striking characteristics of this class of immigrants").

¹⁸⁸ *Hawaiian Investigation*, *supra* note 156, at 173 (testimony of Swanzy).

2. Implicit Negative Characterizations

In addition to these blatant characterizations, the media implicitly embedded negative characterizations through language and tone. On the surface, the negative value is less evident, but a latent racism emanates from the reports.¹⁸⁹ Upon closer analysis, the articles reveal implicit depictions of “inferior” Puerto Ricans who were merely commodities for trade and suited only for lowly labor.

a. *Puerto Ricans Are “in Their Place” Doing Oppressive Labor*

In a seemingly positive manner, the media reported that Puerto Ricans enjoyed and were well suited for plantation life, but just beneath the surface, such reports implied that Puerto Ricans were “in their place” doing oppressive work. Before the Puerto Ricans arrived in Hawai‘i, the *Pacific Commercial Advertiser* quoted Lorrin A. Thurston, a prominent member of the Hawai‘i Sugar Planters’ Association, who declared that there were “none more fit [to work on the plantations] than these Porto Ricans [T]hey will be just as happy [as] and probably happier than they were in Porto Rico.”¹⁹⁰ Nine months later, the *Advertiser* affirmed Thurston’s claim: “Porto Ricans are the best suited to work on the plantations” and, compared to Europeans, Puerto Ricans “are most satisfactory and will remain with more willingness at their positions.”¹⁹¹ By implying that Puerto Ricans were naturally suited to do lowly work that whites refused, the planters bolstered their allegations that Puerto Ricans were inferior to whites. The image of a happy Puerto Rican laborer was thus a negative depiction that reinforced the planters’ other blatant negative characterizations.

¹⁸⁹ See, e.g., Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317–318 (1987) (discussing the “racist implications” behind “compliments”).

¹⁹⁰ *Porto Ricans are Public Charges*, PAC. COM. ADVERTISER, Dec. 27, 1900, at 3. The image of a “happy” oppressed Puerto Rican laborer parallels the minstrel images of African Americans in the mid 1800s. These images “created and disseminated stereotypes of African-Americans as inept urban dandies or happy childlike slaves” and, similar to the image of a “happy” oppressed Puerto Rican laborer, the minstrel image “reassured [the populace] that blacks were docile, cheerful, and content with their lot.” Delgado & Stefancic, *supra* note 77, at 1263, 1276.

¹⁹¹ *Porto Ricans in These Islands*, *supra* note 162.

b. *Puerto Ricans Are "Commodities for Trade—Not Human Beings"*

In a similar manner, the media published ostensibly neutral reports of Puerto Rican emigration. But on a subconscious level,¹⁹² the reports embedded depictions of Puerto Ricans as animals and commodities rather than human beings.¹⁹³ Reports that recruiting agents "furnish[ed] oxcarts to haul [Puerto Ricans],"¹⁹⁴ and that health officials "carefully fumigated" and bathed them in "disinfecting fluid" at "Quarantine Island"¹⁹⁵ conjured images of the planters rounding up cattle and treating them for diseases no human could withstand. Called the most "wretched lot of human beings [that] ever came to these Hawaiian Islands," the Puerto Ricans were "[h]erded like cattle, each bearing a tag with his name and the name of the plantation to which [he was] consigned, bunched together in such a way that it was practically impossible for them to do much more than sit up and eat and lie down to sleep."¹⁹⁶ Indeed, the *Advertiser* assured that, like work oxen, "as soon as [Puerto Ricans were] strengthened they [became] valuable."¹⁹⁷ To the plantation owners, the Puerto Ricans' value depended on their strength, and because the planters controlled their strength (through food provisions and workload), they also controlled their value.

Language describing the Puerto Ricans' recruitment and emigration as "collecting,"¹⁹⁸ "haul[ing],"¹⁹⁹ and "import[ing]"²⁰⁰ likewise implied that Puerto Ricans were merely a commodity. Even explicit negative characteristics, such as "puny-squalid set,"²⁰¹ carried implicit commoditization. Such characterizations denoted that Puerto Ricans were merchandise—assessed upon purchase. These implicit characterizations likely played a significant role in the sugar oligarchy's control of Puerto Ricans

¹⁹² See Lawrence, *supra* note 189, at 323 (discussing culturally induced unconscious racism).

¹⁹³ See Carr, *Image*, *supra* note 2, at 96 (maintaining that "the moment the Puerto Rican laborer came in contact with the recruiters he became the commodity of an alien power").

¹⁹⁴ *Porto Rican "Slaves" of Hawaii*, *supra* note 154.

¹⁹⁵ *Porto Ricans on Colon*, *supra* note 187, at 4.

¹⁹⁶ *Hawaiian Investigation*, *supra* note 156, at 209–211 (testimony of Judge Humphreys (quoting *Honolulu Advertiser*, Jan. 17, 1901)).

¹⁹⁷ *Porto Ricans in These Islands*, *supra* note 162.

¹⁹⁸ *Porto Rican "Slaves" of Hawaii*, *supra* note 154.

¹⁹⁹ *Id.*

²⁰⁰ *Porto Ricans are Public Charges*, *supra* note 190.

²⁰¹ *Wretched Lot*, *supra* note 1.

by conditioning the public to judge Puerto Ricans according to those sub-conscious stereotypes and to thereby perpetuate racial discrimination.²⁰²

Each stereotype, implicit and explicit, soon became absolute.²⁰³ By continuously referring to Puerto Ricans as a whole, the plantation-controlled media successfully generalized negative values to the entire ethnic group—Memmi's third discursive strategy. Employing Memmi's first three strategies (stressing differences, assigning negative values, and generalizing the negative values), the planters successfully created a race that was a valuable commodity—desperate laborers who were happy doing oppressive work because they were unsophisticated, inferior, and oblivious.

3. Discrediting Contrary Reports to Make the Plantation Owners' Characterizations Appear Absolute

As part of their strategy, the planters reinforced their generalized, negative characterizations of Puerto Ricans by dispelling depictions of plantation life that were contrary to the planters' carefully crafted media images. When Judge Abram S. Humphreys of the Honolulu Circuit Court criticized the planters' treatment of Puerto Ricans, the *Pacific Commercial Advertiser* discounted the judge's observations as "malicious" and proclaimed they were "[a]ttacks [on] [s]ugar [i]nterests" and "designed to make it more difficult . . . to settle the labor issue."²⁰⁴ The plantation owners' efforts to discredit reports of mistreatment also extended to West Coast news outlets. The *Hawaiian Star* criticized the *San Francisco Examiner's* more sympathetic coverage of the Puerto Ricans, stating that the *Examiner* was "seeking to create the impression that the Planters' Association [wa]s responsible for the present plight of these unfortunates and to bully and coerce the planters into providing for them."²⁰⁵

The territorial newspapers also discounted Puerto Rico's media reports of slave-like conditions in Hawai'i. Branding such reports "scare stories," the *Advertiser* proclaimed that "the ignorant would-be emigrants are

²⁰² Media, as a source of culture, transmits racialized "beliefs and preferences" that are experienced implicitly. See Lawrence, *supra* note 189, at 323. These "tacit understandings" about race can unwittingly influence decision making. See *id.*; see also Krieger, *supra* note 70 (asserting that racial stereotypes, as implicit forms of bias, affect intergroup judgment and decision making).

²⁰³ See, e.g., Carr, *Image*, *supra* note 2, at 103 (asserting that "[t]he image the HSPA projected of the Puerto Ricans determined the society's response to the Puerto Rican presence in the community" and "in the minds of many the image became fact").

²⁰⁴ Judge Humphreys *Attacks Sugar Interests of Hawaii*, *supra* note 99.

²⁰⁵ *The Porto Ricans*, *supra* note 168.

led to believe they are being sold into slavery and that their masters will subject them to all manner of torture and cruelty.”²⁰⁶ The *Hawaiian Star* labeled those who warned Puerto Ricans “busy-bodies or malicious persons” and disparaged their warnings as “persistent and malicious attempts to arouse [the Puerto Ricans’] fears and suspicions.”²⁰⁷ Lorrin Thurston insisted that such reports “poisoned” the Puerto Ricans’ minds.²⁰⁸ By discrediting all negative reports of plantation life, the media suppressed any counternarratives about Puerto Ricans and thus fashioned an empty canvas on which to paint their own depictions.

The plantation-controlled media simultaneously countered any negative depictions of the planters by portraying the transportation, accommodation, and medical supervision of Puerto Ricans as benevolence. This veiled the logistical reality: the planters needed the Puerto Rican laborers, and the subsidized transportation, vaccinations, and accommodation were necessary to employ poor laborers from overseas—at least until they received wages. The media praised the plantations for “feed[ing] [Puerto Ricans] carefully”;²⁰⁹ providing transport, residence, fuel, water, and medical treatment;²¹⁰ “vaccinat[ing]”; and “cheaply, but substantially cloth[ing]” the laborers.²¹¹ Thurston assured the public that the planters were providing “better homes and better living than [the Puerto Ricans] were accustomed.”²¹²

A U.S. Labor Commissioner report similarly proclaimed that Hawai‘i’s plantation life helped the Puerto Ricans to “acquir[e] habits of persistent industry that they might never have gained in their own country.”²¹³ Indeed, the report contended, many Puerto Ricans had “lost the dejected, drooping walk that characterized them on their arrival, and step[p]ed out as freely and vigorously as the jaunty little Japanese.”²¹⁴ According to the report, along with the planters’ benevolence and the “encouraging” work

²⁰⁶ *Porto Ricans on the Move*, *supra* note 161.

²⁰⁷ *The Porto Ricans*, *supra* note 168.

²⁰⁸ *Porto Ricans are Public Charges*, *supra* note 190.

²⁰⁹ *Porto Ricans in These Islands*, *supra* note 162.

²¹⁰ *Id.*; *Porto Ricans are Public Charges*, *supra* note 190; *The Porto Rican Exodus*, *supra* note 153.

²¹¹ *The Porto Rican Exodus*, *supra* note 153; *see also The Coming Porto Ricans*, PAC. COM. ADVERTISER, Apr. 19, 1901, at 5. These minimal services were likely necessary to successfully bring the poor laborers to Hawai‘i, but the media portrayed them as acts of benevolence.

²¹² *Porto Ricans are Public Charges*, *supra* note 190.

²¹³ Report of the Commissioner, 1901, *supra* note 140, at 26.

²¹⁴ *Id.* at 29.

environment, the Puerto Ricans' own racial make-up would help turn the Puerto Ricans around: "He possesses the heredity of the Caucasian, and with the discipline of regular work and the encouragement of the social and political environment he finds in Hawaii, he ought to turn out in the course of time a fairly intelligent and industrious citizen."²¹⁵ These glowing reports of exemplary treatment replaced negative depictions of plantation life with favorable impressions of the planters. This gave the sugar oligarchy credibility in the public eye and lulled the populace into conceding to the planters' dominion over Puerto Rican laborers.²¹⁶

4. Justifying the Plantation Owners' Privilege over Puerto Ricans

The white sugar planters—who had great influence in Congress²¹⁷—relied on their newly created "mythology of the deficient, dehumanized"²¹⁸ Puerto Rican to justify their privilege over all Puerto Ricans—Memmi's fourth element. The planters initially exerted privilege through oppressive "attitude[s] and . . . behavior"²¹⁹ toward the new laborers, but eventually their aggression extended to complete economic and political control.²²⁰ Although challenged by the plantation-controlled media, Judge Humphreys observed the Puerto Ricans' oppression and condemned the planters' deceptions²²¹:

[Puerto Ricans] have been imposed upon and woefully deceived since they arrived in Hawaii. . . . The planters promised to educate the children, but they are trying also to break their word . . . with the excuse that

²¹⁵ *Id.* at 33.

²¹⁶ See Carr, *Image*, *supra* note 2, at 103.

²¹⁷ *He Goes to Washington to Represent the Planters*, PAC. COMM. ADVERTISER, Dec. 14, 1900, at 1 (describing former consul general and internal revenue collector William Haywood's departure for Washington, D.C. to represent the Hawai'i Sugar Planters' Association and to attract investment to Hawai'i). Haywood later traveled to Puerto Rico (as a close friend of Puerto Rico's Governor Allen and at the expense of the War Department) to dispel reports of ill treatment on Hawai'i's plantations and to compel more workers to move to Hawai'i. See *Haywood Goes to Porto Rico*, PAC. COMM. ADVERTISER, Apr. 6, 1901, at 1.

²¹⁸ Williams, *supra* note 76, at 275–276.

²¹⁹ *Id.* at 276.

²²⁰ See Carr, *Image*, *supra* note 2, at 102 (noting the "thorough and complete . . . power of Hawai'i's sugar kingdom on the lives of those 5,000 Puerto Ricans").

²²¹ Likely because the media was controlled by the sugar planters, the newspapers did not report the oppressive conditions on the plantations, but occasionally printed the observations of others. See *Destitute Puerto Ricans*, HAWAIIAN STAR, Nov. 30, 1904, at 1 (quoting a private investigators' disdain for the oppression of Puerto Ricans) ("The whole question of the Porto Ricans ought to be seriously taken up by the government. . . . [T]here are many who are deserving and the[y] are suffering[.]").

too much education is a curse to the Latin laborer [and] that it is better . . . not to elevate them from their condition of semi-serfdom.²²²

Judge Humphreys also lamented the notorious plantation practice of reducing Chinese and Japanese laborers to a “state of bondage.”²²³ He charged that “they were most cruelly and dishonestly treated by their masters”²²⁴ and implied that Puerto Ricans would face the same fate. Humphreys’s comment exposed the totality of the sugar oligarchy’s strategy: to use racism to justify the oppression of peoples of color based on their “strange and disturbing”²²⁵ differences—the differences between “us” and “them.” To the white “us,” the Puerto Ricans were yet another desperate, uncivilized, and lesser people to control and exclude.²²⁶

D. “CRIMINALS” AND “LAZY VAGRANTS”: RACIALIZATION TO SUPPRESS REBELLION

The Puerto Rican laborers were not as submissive as the planters thought them to be. Indeed, they resisted the planters’ tyranny and fought to improve their working and living conditions. In February of 1902, sixty Puerto Rican plantation laborers took an unprecedented stand. In a far-reaching plea for justice, they sent a petition to the *San Juan News*, chronicling their mistreatment by sugar planters and police in the newly created Territory of Hawai‘i.²²⁷ They wrote that hundreds of Puerto Ricans were denied basic rights, arrested and punished without cause, and left without recourse.²²⁸

The fate of the sixty Puerto Rican petitioners seemed doomed from the start. The Republican Territorial Committee immediately asked the

²²² Judge Humphreys Attacks Sugar Interests of Hawaii, *supra* note 99. See also H.K.C., *The Porto Rican Peon*, N.Y. TIMES, July 29, 1900 (“General Davis expresses a doubt as to the advisability of providing schools for [Puerto Ricans]. . . . [I]t would have the effect of making them dissatisfied with their present condition. . . . [A]nd they will then be able to procure what civilized people call the necessities of life.”).

²²³ Judge Humphreys Attacks Sugar Interests of Hawaii, *supra* note 103.

²²⁴ *Id.*

²²⁵ Williams, *supra* note 76, at 276.

²²⁶ See, e.g., Carr, *Image*, *supra* note 2, at 103 (contending that “[t]hese powerful men believed completely in their own superiority and the inherent inferiority of those other races serving on their plantations”).

²²⁷ See Carr, *The Puerto Ricans*, *supra* note 144, at 187 (describing petition to the *San Juan News*).

²²⁸ *Id.* The sugar planters frequently used the police to maintain order on the plantations and to capture and arrest “deserters” as “vagrants.” See TAKAKI, PAU HANA, *supra* note 127, at 72; see also MERRY, *supra* note 135, at 187 (describing the territorial courts’ “reli[ance] on vagrancy prosecutions to keep people at work”).

Territory Attorney General to determine whether Puerto Ricans were U.S. citizens entitled to vote. The Committee was alarmed that “if [the Puerto Ricans] were allowed to vote it would . . . introduce[] a new element into the political situation of the Hawaiian Islands of a rather uncertain quality.”²²⁹

The Attorney General determined that Puerto Ricans were not U.S. citizens and thus had no right to vote in Hawai‘i Territory. Unlike Hawai‘i’s organic act, Puerto Rico’s organic act did not confer U.S. citizenship on Puerto Ricans.²³⁰ Because that citizenship was an “indispensable qualification for the suffrage in [Hawai‘i] Territory,” the Attorney General wrote, “[i]t follows that Porto Ricans cannot vote here without being first naturalized.”²³¹ Of course, mere movement to the Territory of Hawai‘i did not naturalize Puerto Ricans. Indeed, at that time, most Puerto Ricans in the United States could not naturalize at all.²³²

No U.S. official in Puerto Rico responded to the Puerto Ricans’ petition.²³³ A private citizen forwarded the petition to Federico Degetau, Puerto Rico’s first Resident Commissioner (a non-voting delegate), in Washington, D.C.²³⁴ Degetau believed that Puerto Ricans were Americans, and in a response printed in the *San Juan News*, he assured Hawai‘i’s Puerto Rican community that a Hawai‘i Sugar Planters’ Association representative had investigated the issue and concluded that no ill treatment had occurred.²³⁵ The Association representative claimed that he “agreed with Mr. Degetau that the Porto Ricans are Americans” and “should enjoy full citizenship privileges.”²³⁶ The representative also pledged to “appeal to the Supreme Court against [a] decision of the Hawaiian Court withholding the franchise privilege.”²³⁷ The sugar planters’ representations were untrue.

²²⁹ *No Right to Vote: Porto Ricans Not Citizens, Says Dole*, PAC. COM. ADVERTISER, Feb. 26, 1902, at 3. The newspaper article also noted that the Attorney General’s ruling “will, however, settle the question, as it is not likely that any of the Porto Rican laborers will insist upon the right to vote.” *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² Burnett, *supra* note 36, at 709 n.179 (observing that Puerto Ricans could not naturalize because they did not have a foreign citizenship to renounce, and that “most Filipinos (and by implication some unknown proportion of Puerto Ricans) remained nevertheless ineligible for citizenship because the relevant statutes limited naturalization to ‘free white persons.’”).

²³³ Carr, *The Puerto Ricans*, *supra* note 144, at 187.

²³⁴ *Id.*

²³⁵ *Id.* at 188. The Hawai‘i Territorial government determined that the signers had exaggerated their claims. *Id.*

²³⁶ *Id.* at 189.

²³⁷ *Id.* at 188–89.

Not until the Supreme Court of the Territory of Hawai'i's decision fifteen years later, in *Sanchez v. Kalauokalani*,²³⁸ could Puerto Ricans—as U.S. citizens—vote in the Territory of Hawai'i.²³⁹

1. Racialized Characterizations

When Puerto Ricans began to organize against oppressive plantation life, sugar planters sought to suppress rebellion in part through physical force²⁴⁰ and in part by characterizing Puerto Ricans in negative, stereotypical ways. The plantation owners had to change their strategy, and through the media, they created new images of Puerto Ricans. Depicting Puerto Ricans as mentally and physically weak, unable to work independently, lazy, unruly, vagrant, and criminal, the white plantation oligarchy justified forcing Puerto Ricans back onto the plantations and reinforced their economic and political control. Memmi's analysis illuminates how this occurred.

²³⁸ 24 Haw. 21 (1st Cir. 1917); see also *Porto Rican Held American Citizen*, HONOLULU ADVERTISER, Oct. 23, 1917, at 7 (describing the Supreme Court of the Territory of Hawai'i's *Sanchez v. Kalauokalani* decision as one "of deep interest to all Porto Ricans in these Islands who have not taken out papers of citizenship"). The lower court ruled that Puerto Ricans in Hawai'i were not citizens and could not vote. It determined that Congress intended the Jones Act to "make Porto Ricans citizens as long as they remained inhabitants of Porto Rico, giving them thereby citizenship analogous to State citizenship as distinguished from national citizenship, which would be lost by removal from Porto Rico." *Porto Ricans Here Not Entitled to Vote in Territory*, HONOLULU ADVERTISER, May 2, 1917, at 7 (quoting the circuit court decision in *Sanchez v. Kalauokalani*).

²³⁹ The Puerto Rican laborers issued other petitions in protest. For example, in 1904, Puerto Rican laborers sent a petition to Territorial Governor Carter calling for an investigation into their inhumane treatment on one plantation, contending among other things that,

We Porto Ricans only (although we call this American country "our home") form or constitute an exceptionally rare and very painful exception. We are denied almost everything

. . . [W]e are not ignorant of our duties and of our rights, complying with the former and resolved to have the latter respected, for the flag which floats over our heads is a guaranty for our future.

. . . We are suffering numberless vicissitudes; we are orphans and unprotected; all our legitimate expectations and hopes are blasted, all has quick been transformed into gloom verging on desperation.

. . . Reparation must come. We can resist these evils no longer. . . .

Porto Rican Petition, *supra* note 1, at 3. See also *Kauai Has a Porto Rican Case*, HAWAIIAN STAR, Oct. 19, 1904, at 5; The plantation and Hawai'i government also investigated and rejected the petition, finding that the plantation managers and overseers "were kind and good to them," and that the Puerto Ricans on that plantation were "contented." *Kekaha Porto Ricans Complaint Investigated*, PAC. COM. ADVERTISER, Nov. 18, 1904, at 2.

²⁴⁰ See TAKAKI, PAU HANA, *supra* note 127, at 72.

a. *Puerto Ricans Are at Once "Weak" and "Unruly," and "in Need of Plantation Control"*

The plantation owners advanced their new strategy through a campaign that depicted Puerto Ricans as in need of plantation authority to survive. Reverend S.E. Bishop, one of the oldest American settlers in Honolulu, implied that Puerto Ricans would fare better under plantation control, explaining that "[t]he Porto Rican . . . is at a disadvantage in Hawaii, because he is a member of a small race minority, and the disadvantage is made more serious because he seems unable to look after himself."²⁴¹ Media outlets characterized Puerto Ricans as helpless and weak in order to provide "evidence" that Puerto Ricans could not survive on their own. The *Hawaiian Star* described Puerto Ricans as "unfortunate [individuals] born in ignorance."²⁴² Another article, in the *New York Times*, claimed that "they d[id] not seem to have stamina enough to demand respect and fair treatment."²⁴³

The planters simultaneously portrayed Puerto Ricans as recalcitrant and unruly. The article, *Porto Ricans Strike on Plantation of Hawaii*, described a group of Puerto Rican laborers who spent a day in "rest and meditation" because the weather was not suitable for labor.²⁴⁴ The plantation foreman sought to teach the Puerto Ricans a lesson—they were beaten. The sugar-industry-controlled newspaper then cast the workers as unruly and the situation as a strike instead of as a non-workable day,²⁴⁵ thus justifying the plantation owners' treatment and continued control of the Puerto Rican laborers.

The planters also found support for their characterizations in the national debate over Puerto Rico's political status. Highlighting the debate, a territorial newspaper pointed to the recalcitrant Puerto Rican plantation laborer as evidence that Puerto Ricans as a whole could not govern themselves:

A Porto Rican emeute is the latest phase of the plantation labor problem in Hawaii, and seems to furnish conclusive proof that the *Porto Ricans are not capable of self-government*; that is, it has about as much bearing

²⁴¹ *Id.*

²⁴² *Hidalgos Out: Porto Ricans Strike on Plantation of Hawaii*, PAC. COM. ADVERTISER, Mar. 18, 1901, at 14 [hereinafter *Hidalgos Out*].

²⁴³ *Porto Ricans in Hawaii: Those Shipped to Work on Sugar Plantations Declared to be Anxious to Return Home*, N.Y. TIMES, Aug. 30, 1902.

²⁴⁴ *Hidalgos Out*, *supra* note 242, at 14.

²⁴⁵ *Id.*

upon that question as most other arguments that Congress takes into consideration relative to the "New Possessions."²⁴⁶

Hawai'i's sugar barons advanced this fiction not only to ensure their political and economic dominance over people of color in Hawai'i but also to influence the national debate on America's "new possessions."²⁴⁷

b. Puerto Ricans Are "Vagrants"

To reinforce their efforts to force Puerto Rican laborers to remain on the plantations, the sugar planters began to depict Puerto Ricans as lazy and vagrant. By this time, many Puerto Ricans had left the harsh oppression of the plantations in search of better working conditions in the city. One article, *City Full of Beggars*, explained how the new urban Puerto Rican had "a desire to get something for nothing."²⁴⁸ Another warned that "the town was infested with Porto Rican idlers."²⁴⁹ Yet another decried "The Lazy and Thriftless Porto Rican."²⁵⁰ Other Puerto Ricans who did not move to the city moved instead to different and more humane plantations, but they, too, were rebuked by the HSPA-dominated newspapers, which "branded those hard-working laborers who moved from one plantation to another as 'irresponsible' and even accused them of being 'lazy.'"²⁵¹

When a number of Puerto Rican laborers left their plantation because they were "whipped and maltreated," a Spanish interpreter used by the police labeled them "a rather lazy and worthless lot . . . a sort of floating, shiftless element . . . inclined to be lazy."²⁵² One prominent member of so-

²⁴⁶ *Id.* (emphasis added).

²⁴⁷ *Id.*

²⁴⁸ See Carr, *Image*, *supra* note 2, at 100 (citing *City Full of Beggars*, PAC. COM. ADVERTISER, Sep. 1901).

²⁴⁹ *J.A.M. Candless to Judge Wilcox: Criticizes the Light Penalties Given to Dangerous Vagrants Here*, PAC. COM. ADVERTISER, Sep. 27, 1901, at 15.

²⁵⁰ *Ride To Work in Hacks: The Lazy and Thriftless Porto Rican*, HAWAIIAN STAR, May 14, 1901, at 1. See also *Poor Labor Proposition: Porto Ricans Tried and Found Wanting: Hawaiian Planters Have No Use for Them*, L.A. TIMES, Dec. 26, 1901, at 7 ("[W]hen [the Puerto Rican workers] were each paid a few dollars apiece, instead of providing themselves with the necessities of life and preparing themselves for work, . . . they spent every cent . . . on absolutely nothing but soda water, sweet crackers and cigarettes. They gorged themselves on these absurdities like children.").

²⁵¹ See Iris López, *Borinkis and Chop Suey: Puerto Rican Identity in Hawai'i, 1900 to 2000*, in *THE PUERTO RICAN DIASPORA: HISTORICAL PERSPECTIVES* 47 (Carmen Teresa Whalen & Víctor Vázquez-Hernández, eds. 2005) (describing this as "part of the same effort by the press to promote a negative image of Puerto Ricans").

²⁵² *Hidalgos Out*, *supra* note 242, at 14.

ciety called Puerto Ricans “a bad lot, taken as a whole,” “indolent,” “unruly and mean”; a potential source of “serious trouble in Hawaii.”²⁵³ A U.S. Labor Commissioner report explained that, because the Puerto Ricans were “morally upset by their long travels and changed environment” and could not “adapt themselves to any sort of an industrious life,” many became “strollers and vagabonds” and drifted into the towns to “form a class of malcontents and petty criminals.”²⁵⁴ The “boss” of the O‘ahu jail attributed this new “evil” to the Puerto Ricans’ inherent nature: “The evil of vagrancy is growing in the community, owing perhaps to the character of our new population.”²⁵⁵ Classifying Puerto Ricans as vagrants implied that they needed discipline and that the plantation was the place to supply it.

c. *Puerto Ricans Are “Criminals”*

For the sugar planters and territorial authorities, Puerto Ricans’ “vagrancy” was not only bothersome—it was criminal. Authorities characterized Puerto Ricans as hard criminals deserving of harsh physical punishment. A jail boss explained, “I think it is a good idea to deal with [vagrancy] severely. The Porto Ricans who are in [jail] now and at work in the crusher are likely to be very careful how they lay themselves liable to capture again.”²⁵⁶

Authorities set out on a “crusade”²⁵⁷—on the streets and in the public mind—to brand Puerto Ricans as criminals and to round them up for that reason. One article reported that “[t]here are quite a number of Porto Ricans now serving heavy sentences or imprisonment for vagrancy.”²⁵⁸ Another described a Puerto Rican man whose one-week unemployment

²⁵³ J. Harry Davis, *Notes from Washington: No Record Now of Hawaiian Exports*, PAC. COM. ADVERTISER, Apr. 24, 1901, at 1.

²⁵⁴ Report of the Commissioner, 1901, *supra* note 140, at 26. The report also described them as “untidy . . . compared with the tidy Japanese and other Asiatics employed in the islands[.]” *Id.* This fact, the report states, “has prejudiced plantation managers and the people of the islands against the Porto Ricans.” *Id.*

²⁵⁵ *Hard Times for “Vags”*, *supra* note 1, at 5. One Assistant Attorney General noted, however, that “[t]he definition of a vagrant is a broad one . . . as it includes persons who have insufficient means of support. I’m afraid that I come into the class myself.” *Vagrants Pleaded Guilty: Porto Ricans Released After a Long Wait in the Oahu Prison*, HAWAIIAN STAR, Nov. 29, 1904, at 5 [hereinafter *Vagrants Pleaded Guilty*].

²⁵⁶ *Hard Times for “Vags,” supra* note 1, at 5; *see also Vagrants Pleaded Guilty, supra* note 255, at 5 (reporting that two Puerto Ricans were jailed for two months on vagrancy arrests, even before pleading guilty to the charges).

²⁵⁷ *After the Vagrants*, HAWAIIAN STAR, Sep. 30, 1904, at 5.

²⁵⁸ *Few Porto Ricans Loafing Now, supra* note 1.

garnered a two-month incarceration.²⁵⁹ Yet another proclaimed, "the city has been pretty well cleared of Porto Rican loafers. By following the custom of arresting Porto Ricans who were without employment[,] and . . . [sentencing them] to terms of imprisonment[,] the police have succeeded in clearing the city of very disreputable characters."²⁶⁰ A court interpreter warned of Puerto Ricans' criminal nature: "They are vindictive and treacherous; they never forget, and sooner or later they will probably find a chance to get back at the one who injured them, and it will probably be by a stab from behind."²⁶¹ A U.S. Labor Commissioner report echoed these depictions: "They have brought with them a criminal element . . . and they have faults and weaknesses which it may require a generation or two . . . to correct. They are somewhat given to drinking, gambling, and carrying concealed weapons, and are more quarrelsome and vindictive than [Hawai'i's] other inhabitants."²⁶²

The planters' characterizations of Puerto Ricans as criminals and vagrants reached national news outlets. The *New York Times* reported, for example, that "[t]he Hawaiian authorities state that the criminal element among the Porto Ricans was large. Many of them have been sentenced to hard labor for vagrancy."²⁶³ Unlike the local plantation-controlled newspapers, however, the *Times* cited Puerto Ricans' claims that "the Hawaiian courts are in league with the plantation owners, and that cruel sentences have been visited upon them on that account."²⁶⁴

The oligarchy made the constructed negative characteristics of Puerto Ricans absolutes by generalizing from them, and then justified its sweeping, indiscriminate round-up and imprisonment of Puerto Ricans. After a Puerto Rican man named José Miranda²⁶⁵ allegedly murdered a prominent

²⁵⁹ *Vagrants Pleaded Guilty*, *supra* note 255, at 5.

²⁶⁰ *Few Porto Ricans Loafing Now*, *supra* note 1.

²⁶¹ *Porto Ricans Strike on Plantation in Hawaii*, PAC. COMM. ADVERTISER, Mar. 18, 1901, at 14. See also López, *supra* note 251, at 45 ("One of the successful strategies [of the Hawaii Sugar Planters Association] . . . was to promote a negative social image of Puerto Ricans as aggressive, and to stereotype them in the local newspaper as temperamental knife wielders.").

²⁶² Report of the Commissioner, 1901, *supra* note 140, at 33.

²⁶³ *Porto Ricans in Hawaii*, *supra* note 243.

²⁶⁴ *Id.*

²⁶⁵ Miranda was described as "a fine specimen of the half-breed Spaniard of the Antilles, yet his bold demeanor under the awful circumstances in which he stood denoted him a dangerous man of thoroughbred type." *Justice is Not Slow in Following the Crime*, PAC. COM. ADVERTISER, Sept. 29, 1904, at 3. Even his own lawyer urged the jury to consider his low mental condition: he was "but one degree above a brute." *Murder First Degree Found Against Miranda*, PAC. COM. ADVERTISER, Oct. 7, 1904, at 1. According to his lawyer, a Puerto Rican was bred to carry a knife, which was by itself evidence that he was not contemplating murder: Miranda "was an unfortunate man born in ignorance in a land where human slavery existed. His

white missionary descendant, law enforcement officials were ordered to “round up every Porto Rican who [was] not working.”²⁶⁶ During the first sweep, eleven individuals—both men and women—were arrested as a “result of a crusade” to find the murderer.²⁶⁷ The Puerto Rican women were given three months in jail for vagrancy, three Puerto Rican men were given a year in jail for the same offense, four Puerto Rican men were reprimanded and discharged because they claimed that they had come to the city within the last few days, and one Chilean man was given a one-month sentence for vagrancy. Two months after the original eleven were apprehended, “the police rounded up a crowd of Porto Rican vagrants” consisting of nine women and four men.²⁶⁸ Thus, even though only one Puerto Rican man was accused and convicted of murder, and even though many Puerto Rican “vagrants” were simply trying to escape harsh plantation conditions for a better life, all Puerto Ricans were targets of accusation and effectively cast as lawbreakers.²⁶⁹

2. Creating Racial Hierarchies

To create racial hierarchies and further justify their privilege, the plantation owners compared the “lazy and thriftless” Puerto Ricans to other racial groups on the plantations. This method of creating social hierarchies was familiar to the United States, as the white plantation elite of the early American colonies used this strategy to racialize and subjugate blacks and thus elevate poor whites over them. As one scholar articulated, “[o]nly one fear was greater than the fear of black rebellion in the new American colonies. That was the fear that discontented whites would join

environment was such as to excite pity and he should not be judged as the jury should judge a bright, intelligent man. . . . [I]n the case of the unfortunate Porto Rican, bred in slavery to carry a knife, there was no intention of committing a murder that night just because he had a knife.” *Miranda’s Defense*, HAWAIIAN STAR, Oct. 6, 1904, at 1.

²⁶⁶ *The Law Moves Without Delay: The Slayer of Damon is Already Indicted*, HAWAIIAN STAR, Sep. 28, 1904, at 1, 5 (reporting that “[t]hey [were] either given terms of imprisonment or forced to leave the city to seek work”).

²⁶⁷ *See After the Vagrants*, *supra* note 257, at 5.

²⁶⁸ *Porto Rican Vags*, HAWAIIAN STAR, Dec. 10, 1904, at 1; *see also Cases Heard By Wilcox*, PAC. COM. ADVERTISER, Sept. 6, 1901, at 2 (describing arrests of several Puerto Ricans for vagrancy).

²⁶⁹ Members of the public advocated for harsh treatment of Puerto Ricans. Responding to a judge’s lenient decision for a Puerto Rican, an opinion piece in the *Pacific Commercial Advertiser* stated, “If Judge Wilcox can’t protect this town from lawlessness he might step down and out and let us have a judge who won’t fine police officers for chastising hoodlums who, when criticized in a friendly manner, will get behind his bench to censure a citizen who has the temerity to breathe it to His Majesty.” *J.A. M’Candless to Judge Wilcox*, *supra* note 249, at 15.

black slaves to overthrow the existing order.”²⁷⁰ The white elite negatively characterized African Americans as lazy, savage, and even naturally criminal, thereby giving poor whites a sense of superiority over African Americans.²⁷¹ This created a complex racial hierarchy while ensuring the white elite’s continued political and economic dominance over all.

Just as African Americans and poor white Americans were pitted against each other to justify the white elite’s political and economic superiority, so too were the Japanese, Puerto Ricans, and other ethnic groups differentially racialized to stave off collective uprising and justify the white oligarchy’s economic and political control in Hawai‘i. As Norma Carr described,

The Puerto Rican was judged negatively for not being like the Oriental, long-suffering; not being like the Portuguese, obedient; not being like the *Haole* (Caucasian), a capitalist. He was a deviant, the product of misery and starvation. He was unorganized, and lacked social structure and traditions of industry and thrift. . . . he had a history of revolution and carried weapons, . . . he loved gambling, drinking, and loafing[.]²⁷²

Indeed, a news article reported that the Puerto Ricans “[we]re not to be compared to the Japanese. The latter are lively, active and good workers. The Porto Ricans can never compete with the Japanese as laborers.”²⁷³ These racialized comparisons were also reported nationally. A front page *New York Times* article reported on the vagrancy and lack of morality of

²⁷⁰ HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES, in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 101 (Juan F. Perea, et al., eds. 2007).

²⁷¹ *Id.* at 102 (noting also that the ruling class began offering white servants benefits denied to blacks); see also Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959, 968 n.19 (2000) (describing how United States law “began to reflect racialized thinking around [the 1640s], because the master/servant relationship was changing from one of white over white to one of white over black”); see generally WINTHROP D. JORDAN, THE WHITE MAN’S BURDEN: HISTORICAL ORIGINS OF RACISM IN THE UNITED STATES 170–74 (1974) (describing the development of slavery and racial consciousness in the United States).

²⁷² Carr, *Image*, *supra* note 2, at 103; see also *The Labor Issue in the Islands*, PAC. COMM. ADVERTISER, Dec. 11, 1902, at 1 (using highly racialized characterizations to describe various racial groups on the plantations). All groups on the plantations were racialized and suffered at the hands of the sugar planters, but some scholars assert that Puerto Ricans likely faced particular discrimination because they were a “more African-appearing group.” MERRY, *supra* note 135, at 324; see also Edward D. Beechert, *Patterns of Resistance and the Social Relations of Production in Hawaii*, in PLANTATION WORKERS: RESISTANCE AND ACCOMMODATION 56 (Brij V. Lal, Doug Munro & Edward D. Beechert, eds., 1993) (“The Porto Rican was considered very much inferior to all the others until the Filipino was brought in” (quoting U.S. Immigration Comm’n, *Industrial Conditions in Hawaii*, 1911, at 3–4)).

²⁷³ J. Harry Davis, *Notes from Washington: No Record Now of Hawaiian Exports*, PAC. COMM. ADVERTISER, Apr. 24, 1901, at 1.

the Puerto Ricans in Hawai'i: "[t]he Porto Ricans have been scarcely less vagrant [than the Portuguese], and morally are worse than the Japanese."²⁷⁴ The planters' attempts to create racial hierarchies by placing some groups (e.g., the Japanese) slightly above the others (e.g., the Puerto Ricans) fueled racial tensions and intense competition between the groups. At the same time, the white oligarchy assigned negative differences to all groups of color to maintain its total control. It was not just pure racism, but calculating economic (and political) strategy, which enabled the white oligarchy to embed damaging stereotypes into all facets of daily life. And these representations still hold sway. As discussed below, today's injustices remain rooted in part in these characterizations.

E. A COALESCENCE: PUERTO RICAN RACIALIZATION IN HAWAI'I AND NATIONWIDE

As described above, the early negative cultural images of Puerto Ricans generated by U.S. government officials centered largely on what kinds of people could become part of the United States. Racialization on a national level was used to support explicit political decisions about the U.S.'s gate-keeping function—whether to incorporate a larger body of people as full members of the U.S. polity. Alongside those pervasive national stereotypes, private agribusiness and local government in Hawai'i deployed racialized images of Puerto Ricans to control them once they arrived. The sugar planters developed these racialized characterizations about Puerto Ricans to suppress labor, a significant local and national concern in the early 1900s.²⁷⁵

Hawai'i's racialization, while seemingly isolated and specialized, was far reaching. It coalesced with and bolstered the nationwide racialization of Puerto Ricans to support the exclusion of Puerto Ricans from the

²⁷⁴ *Sunshine and Shadows of Hawaii; A Bird's-Eye View of America's Blighted Paradise*, N.Y. TIMES, Feb. 18, 1906, at 1. Twenty years later, when the United States War Department sought to give Puerto Ricans free passage to Hawai'i in order to boost the numbers of laborers who could serve as U.S. troops, a governmental study of the plan reproduced the same kinds of racialized characterizations. See *Seek Porto Ricans as Hawaiian Labor: Officials Favor Free Passage for Them to Supersede the Excluded Japanese*, N.Y. TIMES, June 14, 1924.

²⁷⁵ See *The Labor Issue in the Islands*, *supra* note 272, at 1 (reporting that the U.S. "has just come through one of the most serious industrial crises of the century—a hand-to-hand contest between capital and labor" and that Hawai'i contains "an object lesson which statesmen at Washington would do well to study on the eve of the reconvening of Congress [because] . . . [t]he labor problem of the Hawaiian Territory contains many aspects which must be encountered in the development of the Philippines.").

U.S. polity.²⁷⁶ At the turn of twentieth century, when Hawai'i's sugar barons expanded their markets and increased their global reach, their racialized characterizations of Puerto Ricans and other laborers as "uncivilized" and "ignorant" were reproduced throughout the nation's newspaper-newspapers.²⁷⁷ When the planters transported thousands of "degenerate" and "squalid" Puerto Rican laborers across the country for shipment to Hawai'i, the West Coast media kept close watch.²⁷⁸ Plantation labor protests by "vindictive" and "treacherous" Puerto Ricans were reported to federal authorities, investigated by national and local officials, and reported in national newspapers.²⁷⁹ And, as mentioned, the planters exerted power in Washington, and armed with these racialized characterizations, successfully lobbied for certain labor and immigration policies.²⁸⁰

²⁷⁶ The impact of the Hawai'i characterizations of Puerto Ricans is speculation, but it appears to have provided additional racialization to support the general treatment of Puerto Ricans. Of course, the racialized national debate over the status of the territories was much larger, and took place in the courts, Congress, the media and in public forums. Nonetheless, the racialization of Puerto Ricans that occurred in Hawai'i is important to understanding this larger picture.

²⁷⁷ See, e.g., *Want Porto Ricans In Hawaii: Agents Trying to Enlist Laborers*, BOS. DAILY GLOBE, July 22, 1900, at 20; *Porto Ricans Wanted in Hawaii: Agents at San Juan Offer Free Transportation for 5,000 Laborers*, WASH. POST, July 22, 1900, at 3.

²⁷⁸ *Porto Rico Emigrants: Are They Doomed to a Life of Slavery?*, L.A. TIMES, Dec. 12, 1900, at I15 (reporting on the "alleged outrageous treatment" of Puerto Ricans en route to Hawai'i from Puerto Rico and describing the Puerto Ricans as "degenerate" and "miserable"); *Porto Ricans Ship from Port Los Angeles for Hawaii*, L.A. TIMES, Apr. 14, 1901, at B4 (reporting that the railroad transporting the Puerto Ricans made "strenuous efforts" to keep the condition and whereabouts of the Puerto Ricans secret).

²⁷⁹ See *Porto Ricans Well Treated*, WASH. POST, Nov. 11, 1902, at 6 (reporting on Territory of Hawai'i Governor Dole's statement to United States Secretary of the Interior denying reports of ill treatment of several thousand Puerto Ricans on the plantations); *Porto Ricans Sigh for Native Land: Want Congress to Send Them Home from Hawaii*, L.A. TIMES, Dec. 10, 1902, at 6 (reporting that Puerto Ricans adopted a resolution asking Congress to send them back to Puerto Rico, and describing the "trouble" between the Puerto Rican laborers and sugar planters, including charges that Puerto Ricans were "ill treated"); *Charges Made by Porto Ricans Are False, Planters' Official Asserts*, HONOLULU ADVERTISER, Sept. 3, 1919 (describing Puerto Rican laborers' charges of oppression, the sugar planters' denial of charges, and the Puerto Rico legislature's resolutions demanding an investigation); *Hawaii Denies Charge Made by Porto Ricans*, L.A. TIMES, Oct. 12, 1919, at I124 (describing Hawai'i sugar planters' opposition to Puerto Rican laborers' charges of oppression and injustice on the plantations sent to the Puerto Rican legislature).

²⁸⁰ Among other things, the sugar planters lobbied Congress to allow exemptions for Asian labor and to encourage investment. See EVELYN NAKANO GLENN, *UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR* 239 (2002); *He Goes to Washington*, *supra* note 217, at 1. In arguing for an exemption to the exclusion of Filipinos from the United States, Hawai'i sugar planters argued that if Filipinos were excluded, they would have to bring in Puerto Ricans, who were undesirable because "there is . . . negro blood in the Porto Ricans and that makes it difficult." Carr, *The Puerto Ricans*, *supra* note 144, at 355.

These negative cultural images of Puerto Ricans informed and complemented the racialization of Puerto Ricans occurring nationwide, at a time when U.S. government officials were deciding what kinds of people could—or should—become part of the United States. Also, at that time, American agribusiness was rapidly expanding, and Hawai‘i’s sugar oligarchy wielded significant influence over this growth.²⁸¹ In doing so, Hawai‘i’s planters entangled their interests with political interests in Washington, D.C., facilitating United States militarization and imperialism in the Pacific and spurring the influx of cheap labor. Thus, Hawai‘i’s racialization was also partly about “gate-keeping” for Hawai‘i, but more importantly, it was about how big business could exert harsh social control over Puerto Ricans (and other groups) as laborers. Together, these characterizations cemented negative stereotypes about Puerto Ricans as bad for labor and for the social polity.²⁸²

Later, these same derogatory racial depictions from Hawai‘i were reproduced in federal governmental publications. In the 1920s, when the U.S. War Department and Hawai‘i sugar planters sparred over whether to send more Puerto Rican laborers to Hawai‘i, a military study echoed the planters’ racialized characterizations of Puerto Ricans from twenty years earlier. The study reported that Puerto Ricans were “so difficult of accomplishment,” “ha[d] the highest ratio as law breakers,” and had the highest “percentage of illiterates . . . except [for] the Filipinos.”²⁸³ Their “redeeming characteristic,” the study claimed, reflected their simple-mindedness and lack of ambition: “succeeding generations of Porto Ricans stay with the land and remain in rural districts,” while the Japanese, Chinese, and Filipinos “haunt the Cities . . . preferring ‘White collar’ jobs to labor in the fields.”²⁸⁴

²⁸¹ See *supra* note 19 and accompanying text.

²⁸² Of course, Puerto Ricans were not the only recipients of harsh, racialized treatment. For descriptions of the racialization of other racial groups on Hawai‘i’s plantations, see TAKAKI, PAU HANA, *supra* note 127; BEECHERT, *supra* note 21; *The Labor Issue in the Islands*, *supra* note 272, at 1.

²⁸³ Carr, *The Puerto Ricans*, *supra* note 144, at 347 (quoting report).

²⁸⁴ *Id.* On the other hand, the report also attributed the Puerto Ricans’ perceived military ability to their racial heredity: “In comparing the Porto Rican with other types, such as the Filipino, one must go back to their blood. They have some good fighting blood. Their Spanish blood was excellent Infantry stuff. The Carib Indian was rather a good fighter.” *Id.* at 350. This praise for Puerto Ricans was partly done to discourage importation of Filipino laborers and to limit the political power of other Asian laborers: bringing in Puerto Ricans would “neutralize the present political menace of the predominating Oriental races . . . who[, it was feared, would] eventually exert a powerful political influence in Governmental affairs.” *Id.* at 351. Hawai‘i’s plantation owners opposed the U.S. government’s attempts to bring in more Puerto Ricans because the planters did not want a block of new voters and citizens with U.S. constitutional protections, and

These racialized images of the past are reproduced in the present, through law, to continue the subjugation of the Puerto Rican people.²⁸⁵ This is why the *Igartúa de la Rosa* case is so significant: it is about whether the damaging racialized images will persist or be renounced and reshaped—which is, at bottom, the battle over collective memory.

IV. *IGARTÚA-DE LA ROSA*: A BATTLE OVER COLLECTIVE MEMORY

In 1994, in the first of three challenges to their disenfranchisement, Puerto Rico resident Gregorio Igartúa-de la Rosa and two others filed suit in the U.S. District Court for the District of Puerto Rico. They argued, among other things, that their inability to vote in U.S. presidential elections violated their constitutional rights.²⁸⁶ In *Igartúa I*, the district court dismissed the plaintiffs' claims, and the Court of Appeals for the First Circuit affirmed, ruling that, "only citizens residing in *states* can vote for electors and thereby indirectly for the President." The appeals court explained that because "Puerto Rico is concededly not a state, it is not en-

because they worried that "the mulatto[,] being in the ascendancy politically in Porto Rico[,] would undoubtedly present and create many complications which might destroy [the planters'] efforts to get jibaros [poor whites]." See *id.* at 358 (quoting Letter from J.K. Butler, Secretary-Treasurer of Hawaiian Sugar Planters' Association, to Patrick J. Hurley (Oct. 14, 1931)). See also Román *Alien-Citizen Paradox*, *supra* note 15, at 25 (noting that "many perceptions concerning the Puerto Rican people during [the 1940s] mirrored the racist and nativistic sentiment of the early 1900s" and that during the 1940s, "there were 'general notions' in the U.S. that all Puerto Ricans were 'oversexed' and indulged in 'excessive promiscuity[.]' Americans believed 'that the men carry knives and use them unrestrainedly, that all Puerto Ricans are ignorant, unintelligent and stupid because they do not speak English . . .'" *Id.* (quoting Richie Pérez, *From Assimilation to Annihilation: Puerto Rican Images in U.S. Films*, 2 CENTRO BULL., Spring 1990, at 8, 12)).

²⁸⁵ See Román, *Alien-Citizen Paradox*, *supra* note 15, at 32 ("Congress's nativist and xenophobic fears continue to threaten the process that may lead to freedom and full acceptance for the people of Puerto Rico."). This exclusion from the United States' polity has had serious consequences. See Torruella, *Hacia Donde Vas*, *supra* note 101, at 1520 n.109 (referring to the "social scientific evidence of socioeconomic and cultural consequences of the political status of Puerto Rico").

²⁸⁶ *Igartúa-De La Rosa v. United States*, 842 F. Supp. 607, 608 (D.P.R. 1994). Some plaintiffs always resided in Puerto Rico and never participated in United States' presidential elections. *Id.* Others voted in U.S. presidential elections while residing in a State, but became ineligible to vote because of their change of residence to Puerto Rico. *Id.* The second group argued that the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) violated their rights to due process and equal protection of the laws because it denied them, as United States citizens "who previously voted in presidential elections[,] the right to absentee voting." *Id.* at 611; see also *Romeu v. Cohen*, 265 F.3d 118 (2nd Cir. 2001) (holding that, among other things, the UOCAVA did not violate the equal protection rights of a Puerto Rico resident who was formerly a resident of New York; the UOCAVA did not deprive him of the right to vote; and the UOCAVA and New York state law did not violate his right to travel).

titled under Article II [of the U.S. Constitution] to choose electors for the President, and [therefore] residents of Puerto Rico have no constitutional right to participate in that election.”²⁸⁷ For the court, only a constitutional amendment or a grant of statehood to Puerto Rico could facilitate the vote.²⁸⁸

In 2000, Igartúa-de la Rosa and the others filed suit again, this time contending that, as U.S. citizens, they were “vested with the inherent power to vote for those who represent them.”²⁸⁹ They argued that the U.S. Constitution and the International Covenant on Civil and Political Rights guaranteed their right to vote for U.S. president.²⁹⁰ This time, the district court determined that because the right to vote in U.S. presidential elections is “fundamental” and “inherent” in U.S. citizenship, barring Puerto Rico’s residents from voting in those elections is unconstitutional.²⁹¹ Under the court’s reading of the U.S. Constitution, Article II does not bestow any rights; rather, it simply provides the mechanism by which the states’ electors elect the President and Vice President.²⁹² The court thus ordered Puerto Rico’s government to take steps to enable Puerto Rico’s residents to vote in the upcoming presidential election.²⁹³ Ballots were issued.²⁹⁴

²⁸⁷ *Igartúa-De La Rosa v. United States*, 32 F.3d 8, 9–10 (1st Cir. 1994) (citations omitted); see also *Sanchez v. United States*, 376 F. Supp. 239 (P.R. 1974). In *Sanchez*, a Puerto Rico resident challenged the constitutionality of Public Law 600 (providing “for the organization of a constitutional government by the people of Puerto Rico”), contending that it “did not permit her, as a United States citizen, to vote for the President and Vice President of the United States.” *Id.* at 240. The district court ruled that her constitutional challenge was meritless because “[a]lthough plaintiff is a United States citizen, under the Constitution of the United States the President is not chosen directly by the citizens, but by the electoral colleges in the States[.]” *Id.* at 241. As such, until Puerto Rico becomes a state or a constitutional amendment extends the presidential and vice presidential vote to Puerto Rico, “there is no substantial constitutional question raised by plaintiff.” *Id.* at 242; see also *Att’y Gen. of the Territory of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984) (ruling that, absent a constitutional amendment, United States citizens residing in Guam do not have a constitutional right to vote in United States presidential elections).

²⁸⁸ *Igartúa-De La Rosa*, 32 F.3d at 9. The court also held that the UOCAVA violated neither the Due Process nor the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. *Id.* at 10.

²⁸⁹ *Igartúa-De La Rosa v. United States*, 107 F. Supp. 2d 140, 141 (D.P.R. 2000) (denial of government’s motion to dismiss); *Igartúa-De La Rosa v. United States*, 113 F. Supp. 2d 228 (D.P.R. 2000) (final opinion and order).

²⁹⁰ *Igartúa de la Rosa*, 107 F. Supp. 2d at 141.

²⁹¹ See *Lazos Vargas*, *supra* note 34, at 936.

²⁹² *Igartúa-De La Rosa*, 113 F. Supp. 2d at 232–33. The court also ruled that the word “state” in the United States Constitution was not limited to the fifty states but had “evolved in understanding and meaning” to include U.S. territories. *Id.* at 235.

²⁹³ *Id.* at 242.

The First Circuit reversed, ruling that *Igartúa I* controlled because Puerto Rico had not become a state and the U.S. Constitution had not been amended in the ensuing time period.²⁹⁵ The First Circuit again held that Puerto Rico's residents could not vote in U.S. presidential elections because, under Article II of the U.S. Constitution, Puerto Rico cannot appoint presidential electors.²⁹⁶ Judge Juan R. Torruella concurred in the result but wrote separately to highlight the colonial history of Puerto Rico and the modern-day injustices to Puerto Rico's people.²⁹⁷

The same group of plaintiffs brought suit for a third time in 2004, arguing that their inability to vote in presidential elections violated the U.S. Constitution and the United States' international obligations.²⁹⁸ In *Igartúa III*, the district court rejected the plaintiffs' claim that new developments in voting law warranted a departure from the First Circuit's earlier *Igartúa-de la Rosa* decisions. The First Circuit affirmed²⁹⁹ but granted a rehearing en banc,³⁰⁰ focusing on the United States' "international legal obligations."³⁰¹

²⁹⁴ See Eduardo Guzmán, Comment, *Igartúa-De La Rosa v. United States: The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Re-Evaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141, 144 (2001).

²⁹⁵ *Igartúa-De La Rosa v. United States*, 229 F.3d 80, 83–84 (1st Cir. 2000) (*Igartúa II*); see also Guzmán, *supra* note 294, at 143 (observing that the case brings into view important questions about U.S. territorial citizens' right to vote and the need to rethink the United States' territorial policy).

²⁹⁶ *Igartúa II*, 229 F.3d at 84. For discussions and debates on specific legal solutions to Puerto Rico's political condition, see José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389 (2007); Christina Duffy Burnett, *Two Puerto Rican Senators Stay Home*, 116 YALE L.J. 408, (Supp. 2007); John C. Fortier, *The Constitution Is Clear: Only States Vote in Congress*, 116 YALE L.J. 403 (Supp. 2007); Luis Fuentes-Rohwer, *Bringing Democracy to Puerto Rico: A Rejoinder*, 11 HARV. LATINO L. REV. 157 (2008) [hereinafter Fuentes-Rohwer, *Bringing Democracy*]; Guzmán, *supra* note 294.

²⁹⁷ See *Igartúa II*, 229 F.3d at 85–90 (Torruella, J., concurring).

²⁹⁸ *Igartúa-De La Rosa v. United States*, 331 F. Supp. 2d 76, 77 (D.P.R. 2004). Plaintiffs also again challenged the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act. *Id.*

²⁹⁹ *Igartúa-De La Rosa v. United States*, 386 F.3d 313 (1st Cir. 2004) reh'g granted, judgment vacated, 404 F.3d 1 (1st Cir. 2005).

³⁰⁰ *Igartúa-De La Rosa v. United States*, 407 F.3d 30, 31 (1st Cir. 2005).

³⁰¹ See generally *Igartúa-De La Rosa v. United States*, 404 F.3d 1 (1st Cir. 2005). Specifically, the court granted rehearing limited to "the international legal obligations of the United States with respect to the eligibility of Puerto Rico residents to vote for President and Vice-President of the United States pursuant to international agreements," and "the availability of declaratory judgment concerning the government's compliance with said obligations." *Id.*

On rehearing, plaintiffs argued that several treaties³⁰² and customary international law obligate the United States to grant Puerto Rico's residents the right to vote in U.S. presidential elections.³⁰³ The en banc court, in an opinion by Judge Michael Boudin, "put the constitutional claim fully at rest" and ruled that the only way Puerto Rico's residents could secure a constitutional right to vote is through statehood or constitutional amendment.³⁰⁴ It then rejected the plaintiffs' contention that the Universal Declaration of Human Rights, the Inter-American Democratic Charter of the Organization of American States, and the International Covenant on Civil and Political Rights require Congress to grant Puerto Rico's residents the right to vote in U.S. presidential elections. Finally, the en banc majority flatly rejected plaintiffs' customary international law arguments, ruling that "[n]o serious argument exists that customary international law . . . requires a particular form of representative government."³⁰⁵ It concluded that the federal courts are not the appropriate venue: "The case for giving Puerto Rico the right to vote in presidential elections is fundamentally a political one and must be made through political means."³⁰⁶

This time, Judge Torruella delivered a scathing dissent.³⁰⁷ Building on his *Igartúa II* concurrence, he first chronicled the racialized history of U.S. imperialism and hegemony in Puerto Rico since 1898—a history ignored by the majority opinion.³⁰⁸ Based on his historical account and the emergence of "a norm of customary international law" that requires a "right to equal political participation,"³⁰⁹ Torruella concluded that the United States' continued denial of the Puerto Rican franchise violated the Law of Nations.³¹⁰

³⁰² Those included the Universal Declaration of Human Rights, the Inter-American Democratic Charter of the Organization of American States, and the International Covenant on Civil and Political Rights. See *Igartúa-De La Rosa*, 417 F.3d 145, 150 (1st Cir. 2005) (*Igartúa III*).

³⁰³ *Id.* at 148–149.

³⁰⁴ *Id.* at 148.

³⁰⁵ *Id.* at 151.

³⁰⁶ *Id.* Plaintiffs filed a petition for certiorari to the U.S. Supreme Court, which was denied. See *Igartúa-De La Rosa v. United States*, 547 U.S. 1035 (2006).

³⁰⁷ Judge Torruella, a Republican, was appointed by President Ford in 1974 to the U.S. District Court for the District of Puerto Rico. Cabranes, *Puerto Rico*, *supra* note 97, at 450–51. After serving for several years as Chief Judge of that court, President Reagan appointed Judge Torruella to the United States Court of Appeals for the First Circuit. *Id.* His views "reflect those of the island's statehood movement." *Id.* at 451.

³⁰⁸ See *infra* Part IV.B.

³⁰⁹ *Igartúa III*, 417 F.3d at 176. He also asserted that a growing constitutional jurisprudence points to voting as a fundamental right. *Id.* at 169.

³¹⁰ *Id.* at 178–79. The Inter-American Commission on Human Rights of the Organization of American States has docketed *Igartúa, et al. v. United States of America* (P-776-06) and *Ros-*

The majority and dissenting opinions thus ignited a “threshold battle” over “who would tell the definitive story” of the United States’ treatment of Puerto Rico—a “collective memory” central to determining whether Puerto Ricans are entitled to equal political participation.

A. THE MAJORITY’S NARRATIVE

The *Igartúa III* en banc majority failed to challenge the racialized historical narratives told in the well-known *Insular Cases*, the Congressional debates, and the popular media. Instead, it provided a narrow and selective historical account of Puerto Rico’s “negotiated” relationship with the United States.

Indeed, the majority told a collective story that sharply discounted the United States’ role in Puerto Rico’s colonial history. Its passing mention of Puerto Rico’s “unincorporated territory” status and its scant citation to the *Insular Cases* effectively erased from the pages of legal history the territorial doctrine’s lasting effects—the enduring second-class status of millions of territorial peoples.³¹¹ Its hollow chronology of the United States’ relationship with Puerto Rico conspicuously ignored the United States’ active role in Puerto Rico’s ambiguous—and indefinite—existence:

Puerto Rico was not one of the original 13 states who [sic] ratified the Constitution; nor has it been made a state, like the other 37 states added thereafter, pursuant to the process laid down in the Constitution. Nor has it been given electors of its own, as was the District of Columbia in the Twenty-Third Amendment.³¹²

The majority declared in passive voice that Puerto Rico’s “status has altered over the ensuing period”³¹³ after 1898, as if U.S. colonization played no part in that inevitable “alteration.” It characterized the 1952 congressional resolution ratifying Puerto Rico’s Constitution not as ques-

sello, et al. v. United States of America (P-1105-06). Michael Richardson, *Puerto Rico Voting Ban Lands US in International Court*, CARIBBEAN NET NEWS, (June 12, 2007), http://www.opednews.com/articles/genera_michael_070612_puerto_rico_voting_b.htm.

³¹¹ See *supra* note 14; see also Rivera Ramos, *Deconstructing Colonialism*, *supra* note 90, at 113 (contending that, although the discourse of the *Insular Cases* was built upon racist conceptions and discredited theories of Social Darwinism and Manifest Destiny, and although it treated territorial peoples as inferior and incapable of self-government, among other things, “the doctrine of incorporation and the category of the ‘unincorporated territory’ are still referred to as if they were merely technical legal terms, untarnished by the imprint of their historical, political and cultural origin”).

³¹² *Igartúa III*, 417 F.3d at 147 (citation omitted).

³¹³ *Id.*

tionable, limited, and under continuing international scrutiny,³¹⁴ but as “an agreement” creating “unique” standing for Puerto Rico.³¹⁵ According to the majority, that popularly approved agreement bestowed on Puerto Rico “a unique ‘Commonwealth’ status.”³¹⁶ But the majority failed to mention that this “unique” label—a “euphemism for the term ‘colony’”³¹⁷—changed very little about Puerto Rico’s political, social, or economic relationship to the United States.³¹⁸ The majority also failed to mention that, at

³¹⁴ See, e.g., General Assembly Press Release, *supra* note 9 (calling on the United States “to expedite [the] Island’s self-determination”).

³¹⁵ *Igartúa III*, 417 F.3d at 147. Puerto Rico’s Constitution was adopted in 1952 under congressional authority established by Public Law 600. See Act of July 3, 66 Stat. 327 (1952) (approving the constitution of the commonwealth); Pub. L. No. 81-600, 64 Stat. 319 (1950) (providing “for the organization of a constitutional government by the people of Puerto Rico”).

³¹⁶ *Igartúa III*, 417 F.3d at 147 (citations omitted). The majority determined that, “In 1951, Puerto Ricans themselves acceded to their present Commonwealth status, and they are today divided as to what relationship they would prefer on the spectrum from statehood to Commonwealth status to independence.” *Id.* at 149. It cited the United Nations’ determination “that the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status” and “that, when choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination.” *Id.* at 149 n.5. As many scholars note, the situation was much more complex. See, e.g., Fuentes-Rohwer, *Bringing Democracy* *supra* note 296, at 164 (2008) (maintaining that, “in ‘consenting’ to the 1952 compact and establishment of a commonwealth, Puerto Rico’s people likely believed that ‘consent’ to plenary power and disenfranchisement, coupled with a new constitution and a measure of self-government, was clearly better than the alternative, which up to that point included plenary powers and disenfranchisement but little else.”); Román, *Empire Forgotten*, *supra* note 14, at 1178 (contending that “[t]he Puerto Rican people’s ‘acceptance’ of their colonial status stems from their adoption of the colonizer’s legitimating symbols and the acceptance of certain core elements of the dominant society”). For discussions and debates on Puerto Rico’s political status, see Román, *Empire Forgotten*, *supra* note 14, at 1155–56; Román, *Alien-Citizen Paradox*, *supra* note 15, at 3; TRÍAS MONGE, PUERTO RICO, *supra* note 101, at 129–30, 135; Fuentes-Rohwer, *Bringing Democracy*, *supra* note 296, at 160; *infra* note 358 and accompanying text.

³¹⁷ See Román, *Empire Forgotten*, *supra* note 14, at 1151.

³¹⁸ See TRÍAS MONGE, PUERTO RICO, *supra* note 101, at 161–63; see also José Trias Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 11, at 232 [hereinafter Trias Monge, *Injustice According to Law*] (describing the broad colonial powers that the United States still exercises over Puerto Rico: specific laws apply to Puerto Rico without Puerto Rico’s specific consent to those laws; the United States Congress “assumes that its laws override even the provisions of the Puerto Rican Constitution”; the United States executive negotiates treaties and issues directives “that affect Puerto Rico, without consultation with the Puerto Rican government”; Americans residing in Puerto Rico do not have comparable rights to Americans living on the mainland United States; the U.S. government claims that Puerto Rico’s sovereignty “resides solely in the United States”; and the U.S. government contends that the United Nations does not have jurisdiction over the United States/Puerto Rico relationship) (citations omitted); Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 235 (asserting, similarly, that Puerto Rico remains a colony of the United States because the U.S. Congress retains plenary power over Puerto Rico; the United States “exercises jurisdiction over the most basic aspects of life in the territory—

the time of that agreement, Congress refused to ratify the Puerto Rico Constitution unless proposed human rights protections were eliminated.³¹⁹ And, as discussed below, the majority ignored the lingering racialized perceptions of Puerto Ricans' inferiority, described earlier, that supported the United States' maintenance of the U.S./Puerto Rico relationship.

The majority opinion is thus striking for what it left out: the past and present-day colonization of Puerto Ricans and the racialization deployed by U.S. decision makers to support it. Those omissions, discussed below, made the majority's decision to deny Puerto Ricans equal political participation seem natural and correct.

Nowhere in the opinion did the en banc majority mention U.S. colonialism in 1898 in Puerto Rico, and simultaneously in the Philippines, Guam, and Hawai'i. Instead, it cast the United States' 1898 land grab and ensuing annexation as a benign "association": "Puerto Rico became *associated with* the United States as an unincorporated territory under Article IV of the Constitution following the 1898 war between this country and Spain."³²⁰ Nor did the majority opinion mention, as Judge Torruella did, Puerto Ricans' sudden loss of self-governance³²¹ or America's false promise to "bestow upon [them] the immunities and blessings of the liberal institutions of our Government."³²² Highlighting this, Judge Torruella called the majority's framing of the U.S. invasion of Puerto Rico "the height of euphemism[.]"³²³

Most significant, the majority never acknowledged that the United States, like other colonial powers, "often used race to legitimize conquest,

communications, currency, labor relations, postal service, citizenship, the environment, etc.—and controls all matters relating to foreign affairs and military defense; [and] Puerto Ricans do not participate directly in decisions" about those matters and do not elect the individuals who do make those decisions).

³¹⁹ See Malavet, *Cultural Nation*, *supra* note 13, at 33–35. Although Puerto Rico's voters were required to approve two other sections of the Puerto Rico Constitution amended by Congress, voters were never asked to approve the removal of the Human Rights Declaration. *Id.* at 35 (citing Proclamation: Amendments to the Constitution of the Commonwealth of Puerto Rico (1953), reprinted in 1 P.R. Laws Ann. 142–43 (1999)). For more in-depth descriptions and analyses of the compact and constitutional convention, see TRIAS MONGE, PUERTO RICO, *supra* note 101, at 113–14, 117; Malavet, *Cultural Nation*, *supra* note 13, at 32–35.

³²⁰ *Igartúa III*, 417 F.3d at 147 (emphasis added).

³²¹ *Id.* at 160–61 (Torruella, J., dissenting).

³²² See Letter of Nelson Miles, Major-General Commanding the U.S. Army to the Inhabitants of Porto Rico (Nov. 5, 1898) in Annual Reports of the War Department for the Fiscal Year Ended June 30, 1900 19–20 (1902).

³²³ *Igartúa III*, 417 F.3d at 160 n.21 (Torruella, J., dissenting) ("In what must be the height of euphemism, the majority refers to [the U.S. invasion of Puerto Rico] as Puerto Rico's becoming 'associated' with the United States.").

denigrating, in racial terms, those colonized.”³²⁴ Unlike Judge Torruella, the majority failed to mention the racialized rhetoric used by early decision makers to deny Puerto Ricans key rights.³²⁵ It also disregarded the inescapable connections between the *Insular Cases*’ sanction of Puerto Rico’s colonization and the infamous “separate but equal” doctrine articulated only five years earlier in *Plessy v. Ferguson*.³²⁶ For the majority, Puerto Rico’s “association” with the United States was—and is—neutral, mutual, and devoid of political, historical, or racial meaning.

Through its glaring omissions—or distorted memory—the majority was more easily able to reject Igartúa-de la Rosa’s treaty arguments. It described Puerto Rico’s “arrangement” with the United States as evenly bargained for, thereby eliminating the need for a voting rights remedy. According to the court, “nothing in [the treaties] says . . . that an entity with the *negotiated* relationship that the United States has with Puerto Rico is nevertheless required to adopt some different arrangement as to governance or suffrage.”³²⁷ The majority instead warned of the embarrassing effects of declaring the United States in violation of those treaties: “[S]uch a declaration by a federal court of a supposed ‘treaty obligation’” might “embarrass the United States in the conduct of its foreign affairs” and “could be trumpeted as propaganda in international bodies and elsewhere.”³²⁸

From the majority’s sanitized historical account emerged a dismembered “memory” of Puerto Rico’s relationship to the United States. According to the majority’s view, because U.S. colonialism left no marks, there is no pressing need to redress Puerto Rican residents’ ultimate disenfranchisement. With this as the backdrop, the en banc majority stepped away from the debate: “Changes to the Constitution and the present status of Puerto Rico are not the province of federal judges, nor are they dictated by international law; those changes can only be adopted as set forth in the Constitution and laws of the United States.”³²⁹

³²⁴ Yamamoto & Betts, *supra* note 24, at 558.

³²⁵ See *Igartúa III*, 417 F.3d at 162–64 (Torruella, J., dissenting).

³²⁶ See *infra* notes 364–71 and accompanying text.

³²⁷ *Igartúa III*, 417 F.3d at 149 (footnote omitted). The majority claimed that “[n]othing in [the treaties] says anything about just who should be entitled to vote for whom.” *Id.* at 149. The full international law implications are beyond the scope of this article. See generally Rafael A. Declet, Jr., *The Mandate Under International Law for a Self-Executing Plebiscite on Puerto Rico’s Political Status, and the Right of U.S.-Resident Puerto Ricans to Participate*, 28 SYRACUSE J. INT’L L. & COM. 19 (2001).

³²⁸ *Igartúa III*, 417 F.3d at 151. (citations and footnote omitted) (“This is a legitimate concern in considering whether ‘discretion’ should be exercised to grant declaratory relief.”).

³²⁹ *Id.* at 152.

B. JUDGE TORRUELLA'S COUNTERNARRATIVE

For Judge Torruella, remedying the injustice to Puerto Ricans fell squarely within the federal court's purview:

Under the combined guise of alleged political question doctrine, its admitted desire to avoid 'embarrassment' to the United States, and its pious lecturing on what it deems to be the nature of the judicial function, the majority seeks to avoid what I believe is its paramount duty over and above these stated goals: *to do justice to the civil rights of the four million United States citizens who reside in Puerto Rico.*³³⁰

To support this, he endeavored to reshape the collective memory of Puerto Ricans' unjust treatment by telling a powerful counternarrative of Puerto Rico's history. His narrative traced the trajectory of U.S. colonization and chronicled the racialized character of U.S. imperialism in Puerto Rico.

Judge Torruella began by rebuking the majority for its gross historical distortions. For him, the majority's account was a "pernicious" mischaracterization.³³¹ Its descriptions of the congressional enactments authorizing Puerto Rico's local self-government, "which the majority calls an 'agreement' for a 'unique 'Commonwealth' status,' and which the majority states resulted in the current '*negotiated* relationship' . . . are simply inaccurate and do not reflect the facts."³³² Those congressional enactments, underscored Judge Torruella, left colonialism intact: they "did nothing to change the underlying constitutional status of Puerto Rico as an unincorporated territory, subordinated to Congress' plenary powers under the Territorial Clause."³³³ Torruella recognized that the majority's collective framing of Puerto Rico's history obscured lasting injustices and erased the present-day need for remedy: "It is not just the majority's inaccuracies in describing the colonial relationship between Puerto Rico and the United States to which I object," he wrote. "The majority's unfortunate choice of language obviously favors the colonial condition[.]"³³⁴

Judge Torruella then sought to recast the collective memory about how "we [came] to this state of affairs."³³⁵ He described the "splendid lit-

³³⁰ *Id.* at 159 (Torruella, J., dissenting) (emphasis added).

³³¹ *Id.* at 160.

³³² *Id.*

³³³ *Id.* (citing sources); see also Cabranes, *Citizenship*, *supra* note 5, at 490–91 (explaining how Congress used its Territorial Clause powers to create Puerto Rico's commonwealth status, but continued to withhold eventual statehood or independence).

³³⁴ *Igartúa III*, 417 F.3d at 160 n.21 (Torruella, J., dissenting).

³³⁵ *Id.* at 159.

the war” of 1898³³⁶ and the ensuing Treaty of Paris as launching “a new period of colonialism which has so far lasted one hundred and seven years.”³³⁷ He highlighted the irony in the United States’ promise of democracy to the Puerto Rican people, alongside its dissolution of their major political rights, newly granted by Spain.³³⁸ He also described the colonialism written into both the Treaty of Paris and the Foraker Act of 1900: the Treaty of Paris “left to future action by Congress what should be ‘[t]he civil rights and political status of the native inhabitants of the territories . . . ceded to the United States.’”³³⁹ For the first time, said Torruella, the United States “acquired territory without *ipso facto* granting its inhabitants citizenship.”³⁴⁰ Indeed, the Foraker Act, which, among other things, established a civil government composed almost completely of officials appointed by the U.S. President, proclaimed that Puerto Ricans were “citizens of Porto Rico.”³⁴¹ As described above, this placed Puerto Ricans in a racialized limbo between citizens and aliens.³⁴²

Judge Torruella also questioned the racialized underpinnings of the *Insular Cases*, comparing their treatment of the United States’ colonial peoples to the “separate but equal” treatment endorsed in *Plessy v. Ferguson*.³⁴³ In the *Insular Cases*, wrote Torruella, the U.S. Supreme Court

³³⁶ *Id.* at 160 n.23 (citations omitted).

³³⁷ *Id.* at 161 (citation omitted).

³³⁸ *Id.* at 160–61 (Torruella, J., dissenting).

³³⁹ *Id.* at 161 (quoting Treaty of Peace art. 4, para. 2, U.S.-Spain, Dec. 10, 1898, 20 Stat. 1754, 1759).

³⁴⁰ *Id.* (Torruella, J., dissenting).

³⁴¹ See Foraker Act, 31 Stat. 79.

³⁴² See *supra* notes 149, 150 and accompanying text.

³⁴³ *Igartúa III*, 417 F.3d at 169 (Torruella, J., dissenting); see also TORRUELLA, SEPARATE AND UNEQUAL, *supra* note 109 (making similar arguments); Cabranes, *Puerto Rico*, *supra* note 97, at 454 (reviewing Torruella’s book). See also José Trias Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 11, at 229–30 [hereinafter Trias Monge, *Injustice According to Law*] (contending that the *Insular Cases* parallel *Plessy*’s holding and “stand for just another version of separate but equal, but with a twist: there is not even the mirage of equality”); *id.* at 4 (maintaining that the decision in *Downes v. Bidwell* “flowed from the holding in *Plessy v. Ferguson* which, like *Downes*, was decided by the Fuller Court and condoned racial discrimination in the United States”). Justice Brown, the author of the first majority opinion in the *Insular Cases*, was also the author of the majority opinion in *Plessy v. Ferguson*. Trias Monge, *Plenary Power*, *supra* note 14, at 4. Except for Justice McKenna, all of the members of the Court who decided *Downes* were also on the Court who decided *Plessy*. See Malavet, *The Story of Downes v. Bidwell*, *supra* note 14, at 144; see also Saito, *Asserting Plenary Power*, *supra* note 81, at 433–34 (contending that between 1886 and 1903, the United States Supreme Court addressed the issue of “the place of those deemed ‘Other’ within American society In seminal decisions regarding immigrants, starting with the *Chinese Exclusion Cases*; Indians, from *United States v. Kagama* through *Lone Wolf v. Hitchcock*; and colonial subjects, in the *Insular Cases* beginning with *Downes v. Bidwell*. In addi-

“sanctioned Puerto Rico’s colonial status *ad perpetuam*. There is no question that the *Insular Cases* are on par with the Court’s infamous decision in *Plessy v. Ferguson* in licencing [sic] the downgrading of the rights of discrete minorities within the political hegemony of the United States.”³⁴⁴ Implicitly acknowledging Albert Memmi’s theory of racial conquest, Judge Torruella cited one scholar’s observation that the United States applied the same race-based denial of rights to the peoples of the new U.S. territories that it applied to African Americans during the Reconstruction period:

Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the Reconstruction period, an attempt at political equality for dissimilar races, or was it to be the Southern ‘counterrevolutionary’ point of view which denied the basic American constitutional rights to people of color? *The actions of the federal government during the imperial period and the relegation of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.*³⁴⁵

In Torruella’s view, Justice Brown’s opinion in *Downes v. Bidwell*, one of the *Insular Cases*, employed “language . . . tinged by *Plessy*-like views” of racial inferiority as justification for subordinating treatment.³⁴⁶ Justice Brown’s opinion warned of the threat to United States dominion if foreign races and cultures inhabiting U.S. territories were incorporated into the U.S. polity:

[I]n the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the

tion to articulating the plenary power doctrine in these cases, the Supreme Court also decided *Plessy v. Ferguson*.” (citations omitted)).

³⁴⁴ *Igartúa III*, 417 F.3d at 162 (Torruella, J., dissenting). In defining the status of Puerto Rico and its people in *Downes*, the Supreme Court quoted at length *Johnson v. M’Intosh*, invoking the harsh conquest ideology that served to subordinate America’s native peoples. See *Downes*, 182 U.S. at 281–82.

³⁴⁵ *Igartúa III*, 417 F.3d at 162 (Torruella, J., dissenting) (quoting RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946* 15 (1973)) (emphasis added).

³⁴⁶ *Id.* at 163 (Torruella, J., dissenting); see also Saito, *Asserting Plenary Power*, *supra* note 81, at 463 (noting one scholar’s assertion that *Plessy* was “not about the segregation of public accommodations so much as the ‘broader question of constitutive rhetoric and collective identity: who belongs to the American polity and on what conditions?’” (quoting Simeon C.R. McIntosh, *Reading Dred Scott, Plessy and Brown: Toward a Constitutional Hermeneutics*, 38 *How. L.J.* 53, 65–67 (1994))).

people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians. . . . A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire.³⁴⁷

As Torruella recognized, judges at the turn of the twentieth century, like other decision makers of the day, were preoccupied by “the danger of racial and social questions” and were eager to give Congress “a very free hand in dealing with the new subject populations.”³⁴⁸

Importantly, Judge Torruella put the *Insular Cases* in historical context by describing the politics of law. He described a legal world of Supreme Court decisions split along ideological lines and tied to political efforts to expand the United States’ territory. According to Torruella, “[w]hether the Constitution applied in the territories acquired as a result of the Spanish-American War was, of course, central to the *Insular Cases*, and a major issue in the 1900 elections, which were won by McKinley and those who favored overseas territorial expansion without extension of the Constitution.”³⁴⁹ Indeed, only a few years earlier, and against the objections of thousands of Native Hawaiians, President McKinley spearheaded the annexation of the Hawaiian Islands to the United States.³⁵⁰

Torruella also noted that William Howard Taft, who had overseen the Philippines, Cuba, and Puerto Rico, and served as Secretary of War under President Theodore Roosevelt, had become during his presidency “openly disenchanted” with Puerto Rico and its residents, “accus[ing] Puerto Ri-

³⁴⁷ *Igartúa III*, 417 F.3d at 164; see also Rivera Ramos, *Deconstructing Colonialism*, *supra* note 90, at 113 (contending that the discourse of the *Insular Cases*, which is still employed in relation to territorial peoples “explicitly adhered to a conception of democracy as a privilege of the Anglo-Saxon ‘race’”).

³⁴⁸ *Igartúa III*, 417 F.3d at 164 (Torruella, J., dissenting) (noting that Justice White “was much preoccupied by the danger of racial and social questions of a very perplexing character and that he was quite as desirous as Justice Brown that Congress should have a very free hand in dealing with the new subject populations” (citing Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926))).

³⁴⁹ *Id.* at 163 n.31 (citing Walter La Feber, *The Elections of 1900*, in 3 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1789-1968, 1877 (Arthur M. Schlesinger, Jr. & Fred L. Israel eds. 1971)).

³⁵⁰ President McKinley submitted a treaty of annexation of Hawai‘i to Congress for ratification in 1897. The treaty was not ratified, but in the meantime, the United States Battleship *Maine* was blown up in Havana Harbor and the ensuing Spanish-American War established Hawai‘i as a strategic military post. See STEPHEN KINZER, *OVERTHROW: AMERICA’S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ* 86 (2006). Pro-annexationists in Congress then submitted a proposal to annex Hawai‘i by joint resolution, requiring only a majority vote. VAN DYKE, *supra* note 3, at 209. The resolution, known as the “Newlands Resolution,” passed and was signed into law by President McKinley on July 7, 1898. *Id.*

co's elected leaders of irresponsibility and political immaturity, and suggest[ing] that too much power had been given to Puerto Ricans 'for their own good.'"³⁵¹ Torruella noted that, when Taft later served as the Chief Justice of the U.S. Supreme Court, he wrote for the Court in *Balzac v. Porto Rico*,³⁵² another of the *Insular Cases*, that Puerto Rico's residents—even after they became U.S. citizens under the Jones Act³⁵³—were to be afforded only “fundamental rights” under the U.S. Constitution.³⁵⁴ In denying the right to jury trial for the United States' territorial peoples, the *Balzac* opinion characterized territorial cultures and communities as inescapably foreign, thus reproducing the same racialized narratives inscribed in the early *Insular Cases*:

The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. . . . Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.³⁵⁵

³⁵¹ *Igartúa III*, 417 F.3d at 166 n.36 (Torruella, J., dissenting) (quoting Message from President Taft to Congress, S. Rep. No. 61-10, at 5); see generally Henry F. Pringle, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* (1939) (Taft biography). As U.S. President, Taft elevated Justice White to Chief Justice of the United States Supreme Court and filled four vacancies on the Court with Justices who supported the “Incorporation Theory.” See Terrasa, *supra* note 97, at 82.

³⁵² 258 U.S. 298, 309 (1922).

³⁵³ The Jones Act served a strategic purpose for the United States. It gave Puerto Ricans “a sense of belonging . . . as well as a sense of loyalty”; destabilized “a growing nationalism movement in Puerto Rico's political spectrum”; and at the same time, denied Puerto Ricans “the right to vote for President and Vice-President and . . . the fundamental right to congressional representation which has characterized United States citizenship.” Román & Simmons, *supra* note 81, at 490; see also *id.* at 489 (maintaining that the Jones Act “was a concession that responded to the xenophobic fear that full incorporation of Puerto Rico would darken the American frontier”).

³⁵⁴ *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (ruling, among other things, that the Sixth Amendment right to jury trial does not apply to unincorporated territories, and that the 1917 Jones Act bestowing citizenship upon Puerto Rico's people did not have the purpose of incorporating Puerto Rico and did not alter Puerto Ricans' constitutional status); see also Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 264–71 (analyzing *Balzac*); see also *Califano v. Torres*, 435 U.S. at 2–3; *Harris v. Rosario*, 446 U.S. at 651–52.

³⁵⁵ *Igartúa III*, 417 F.3d at 166 (Torruella, J., dissenting) (quoting *Balzac v. Porto Rico*, 258 U.S. at 310). Unlike Alaska, the Court proclaimed, the incorporation of Puerto Rico and the Philippines into the United States fold presented grave “difficulties.” While Puerto Rico and the Philippines were teeming with people “living in compact and ancient communities,” Alaska “was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens.” *Id.* at 167 (citing *Balzac*, 258 U.S. at 309); see also Malavet,

Like other judges, and the Hawai'i plantation owners and media, who helped shape the fate of Puerto Ricans, Chief Justice Taft deployed racialized rhetoric to create a clear demarcation between territorial inhabitants and U.S. "Anglo-Saxon"—i.e. white—institutions.³⁵⁶

While denying basic rights to Puerto Ricans in the courts, the United States carefully hid its actions from the world's view. With the advent of the Cold War and the United States' professed commitment to self-determination for the world's peoples,³⁵⁷ the United States reported to the United Nations that Puerto Rico had become a commonwealth, and, as a result, Puerto Rico was removed from the list of non-self-governing territories entitled to decolonization.³⁵⁸ But, as mentioned, the "Commonwealth" status did "not change Puerto Rico's fundamental political, social, and economic relationship to the United States."³⁵⁹ Instead, the "carefully crafted legal regime was intended to conceal the true colonial status of the island because it is part of the U.S. legal structure but different and apart from it. Such a dichotomy was necessary in order for the United States to

The Story of Downes v. Bidwell, *supra* note 14, at 143 (contending that the Court's reasoning is a "clear assumption that the Puerto Rican United States citizens are not the 'American citizens' who could re-settle an 'American' state").

³⁵⁶ *Igartúa III*, 417 F.3d at 169 (Torruella, J., dissenting).

³⁵⁷ See *The Atlantic Charter*, Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom, 55 Stat. 1603 (Aug. 14, 1941); see also Román, *Empire Forgotten*, *supra* note 14, at 1129–37. See generally S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13 (2004).

³⁵⁸ See Malavet, *Cultural Nation*, *supra* note 13, at 35–36; see also Román, *Empire Forgotten*, *supra* note 14, at 1157 ("In 1953 the U.S. informed the U.N. that it would cease to transmit information regarding Puerto Rico pursuant to Article 73(e) of the Charter based on establishment of local constitutional government in Puerto Rico under Public Law 600." (quoting H.R. Rep. No. 104-713, pt. 1, at 12 (1996))). "[W]ith the establishment of the Commonwealth of Puerto Rico, the People of Puerto Rico have attained a full measure of self-government." *Id.* at 1157 (citing H.R. Rep. No. 104-713, pt. 1, at 57 app. IV (1996)); see also *id.* at 1153 (contending that the referendum approving Public Law 600 was severely limited and "not a statement of the Puerto Rican peoples' freely expressed will"). All three of Puerto Rico's political parties later denounced the "commonwealth" status. See *id.* at 1159–60; TRÍAS MONGE, PUERTO RICO, *supra* note 101, at 136–37; see also S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 334–35 (1994) (contending that Hawai'i's removal from the list of non-self-governing territories following statehood, and a limited and questionable plebiscite, further deprived Native Hawaiians of their right to self-determination).

³⁵⁹ See Román, *Empire Forgotten*, *supra* note 14, at 1155 n.163 (citing Hearings Before a Senate Committee of the Committee on Interior and Insular Affairs on S. 3336, 81st Cong. 37 (1950)); see also TORRUELLA, SEPARATE AND UNEQUAL, *supra* note 109, at 147–59 (describing the term "compact" and the confusion it engenders).

lobby after World War II for people's self-determination."³⁶⁰ The United States thus sought to "hide its own colonial empire from allies, to whom it was preaching about decolonization, and from the United Nations."³⁶¹

Recognizing this, Judge Torruella pointedly questioned the United States' legitimacy as a model of democracy in light of its failure to repair colonialism's continuing harms, and admonished the majority for ignoring the United States' hypocrisy. "The U.S. *should* be embarrassed at its denying equal rights to four million of its citizens in this day and age[.]"³⁶² chastened Judge Torruella. "That fact itself—particularly in light of the government's intense encouragement of democratic reform in other nations and purported commitment to international instruments that guarantee equal political participation by all citizens—could be 'trumpeted as propaganda in international bodies and elsewhere.'"³⁶³

Judge Torruella observed that the same kind of international criticism of America's harsh treatment of African Americans during Jim Crow played a role in the Cold War abolition of "separate-but-equal" in *Brown v. Board of Education*.³⁶⁴ "Was it 'embarrassment[.]'" Torruella asked,

³⁶⁰ Malavet, *Cultural Nation*, *supra* note 13, at 43. See also Román, *Empire Forgotten*, *supra* note 14, at 1151 (noting that, at the same time that the U.S. endorsed self-determination principles in the Atlantic Charter, "the Puerto Rican legislature, relying upon the United States's declarations in the Atlantic Charter, demanded that Congress terminate 'the colonial system of government . . . totally and definitely'" (citation omitted)).

³⁶¹ MALAVET, AMERICA'S COLONY, *supra* note 14, at 148–49 (citing Department of State Bulletin (Apr. 20, 1953) and United States/United Nations press release (Mar. 21, 1953)); see also Román, *Empire Forgotten*, *supra* note 14, at 1155–56. Román contends that, "as a signatory to the U.N. Charter, which specifically endorsed self-determination, the United States faced the potential of increasing international scrutiny [regarding Puerto Rico]." *Id.* at 1155–56. To avoid such international embarrassment and condemnation, the United States "ingeniously" pointed to Public Law 600's "compact" language and Puerto Rico's new "commonwealth" status, even while these new developments altered nothing about Puerto Rico's political status. *Id.* at 1156; see also Rodríguez Orellana, *supra* note 90, at 428 (contending that strategic security needs during the Cold War provided a way for the United States "to forgive itself of its colonial 'indiscretions' and to assertively persuade world opinion to look the other way").

³⁶² *Igartúa III*, 417 F.3d at 183 (Torruella, J., dissenting).

³⁶³ *Id.* at 183 (Torruella, J., dissenting) (quoting Boudin, J., majority at 150–51); see also Yamamoto, Serrano & Rodríguez, *American Racial Justice on Trial*, *supra* note 56, at 1329 (asserting in another context that "the United States will lack unfettered moral authority and international standing to sustain a preemptive worldwide war on terror unless it fully and fairly redresses the continuing harms of its own historic government-sponsored terrorizing of a significant segment of its populace").

³⁶⁴ *Igartúa III*, 417 F.3d at 183 (Torruella, J., dissenting); see also Yamamoto, Serrano & Rodríguez, *American Racial Justice On Trial*, *supra* note 56, at 1331. During the Cold War, "the United States waged its war against communism by promoting democracy worldwide while repressing civil rights (racial segregation) and liberties (McCarthyism) at home." *Id.* at 1329 (citation omitted). "Under the glare of global media, state-sponsored systemic oppression of African Americans raised the hard question of whether American democracy inhibited, rather than pro-

“that finally reversed *Plessy*? If embarrassment is what it takes to give equal rights to the United States citizens of Puerto Rico, maybe a dose is appropriate.”³⁶⁵ For him, the actual present-day impacts on Puerto Rico’s people³⁶⁶ and the United States’ responsibility to heal its historic rights violations are paramount.

Indeed, for Torruella, the reversal of *Plessy* by *Brown* still “accentuate[s] the realpolitik of the civil and political rights of the United States citizens who reside in Puerto Rico[.]”³⁶⁷ “[B]ecause of the democratic deficit in the Puerto Rico-United States relationship[.]” he wrote, “Puerto Rico enters its *second century* of its colonial condition with the United States without any resolution of this conundrum in sight.”³⁶⁸ According to Torruella, the reversal of infamous cases like *Plessy* was achieved in part by significant “political clout [that] was transformed into a judicial result.”³⁶⁹ But here, “[n]o effective political pressure can be exercised by the subjects of this colonial relationship on the national political institutions with power to solve the problem.”³⁷⁰ Thus, Torruella maintained, the majority’s call to “political solutions” effectively insulates the United States from the transformative political pressures that overturned *Plessy*: “It is precisely because this discrete population of United States citizens is kept in a vote-

moted, freedom and equality. International critics of America’s global attempt to spread democracy seized on the United States’ own civil rights and human rights record.” *Id.* at 1329–30 (citation omitted). As a result, “American officials responsible for international affairs mounted a campaign to clean up America’s tarnished image abroad, targeting among others the Supreme Court.” *Id.* at 1331. See also MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (William Chafe, Gary Gerstle & Linda Gordon eds. 2000) [hereinafter DUDZIAK, *COLD WAR*]; Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) [hereinafter Dudziak, *Desegregation*]. Mary Dudziak’s extensive historical research reveals that “the government’s position in *Brown* was not driven primarily by a commitment to equality or fairness but by Cold War imperatives.” Yamamoto, Serrano & Rodriguez, *American Racial Justice on Trial*, *supra* note 56, at 1331 (citing DUDZIAK, *COLD WAR* 80); see also Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 373 (2002) (“Document after document and release after release inexorably converge on the same point—the United States needed to do something large-scale, public and spectacular to reverse its declining fortunes on the world stage.”).

³⁶⁵ *Igartúa III*, 417 F.3d at 183 (Torruella, J., dissenting).

³⁶⁶ See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–25 (1987) (contending that legal scholars should adopt a “new epistemological source” that looks to the perspective of “those who have experienced discrimination” and “the actual experience, history, culture, and intellectual tradition of people of color in America”).

³⁶⁷ *Igartúa III*, 417 F.3d at 168 (Torruella, J., dissenting).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

less state by the national political institutions that have ‘plenary powers’ over Puerto Rico that a ‘political solution’ is not a realistic option.”³⁷¹

Thus, as Torruella recognized, while the battle surrounding *Igartúa de la Rosa* is waged on modern-day political and judicial fields, its roots lie in sanitized historical accounts conveyed by media and inscribed by courts and decision makers into law. By selectively characterizing history to narrowly frame its decision, the majority undercut “justice [for] the civil rights of the four million United States citizens who reside in Puerto Rico”³⁷² and maintained the “racial myth that all is well as long as those in power say so.”³⁷³

³⁷¹ *Id.* Judge Torruella chastised the majority for “gloss[ing] over” this injustice and “righteously dictat[ing] that Puerto Ricans’ right to vote in presidential elections is fundamentally a political [issue] and must be [achieved] through political means.” *Igartúa III*, 417 F.3d at 168 (Torruella, J., dissenting). “To what ‘political means’ is the majority referring?” queried Torruella. *Id.* “Political means are precisely what the U.S. citizens of Puerto Rico lack, and cannot create out of thin air as if by alchemy.” *Id.* He linked this lack of political power directly to the historical racialization inscribed in the early cases:

Not only do the national political branches lack incentive to act, but, as illustrated by the majority’s views, this disincentive has also been manifested in the Third Branch, which, if the truth be told, laid the groundwork for this state of affairs with its decisions in the *Insular Cases* and *Balzac*, and continues to perpetuate the inherent inequalities thus created.

Id. at 169 (Torruella, J., dissenting). See also Fuentes-Rohwer, *Bringing Democracy*, *supra* note 296, at 169 (positing that “Congress may decide to create tax incentives for the island, only to then repeal them when it concludes that they are nothing more than ‘corporate welfare[.]’ [or] offer residents of Puerto Rico fewer social benefits than residents of the fifty states, terminate unemployment benefits altogether, or, in the end, set Puerto Rico free, independent from the United States. Congress may do all those things, and it would appear that there is not a thing that citizens of Puerto Rico can do about it.”).

Judge José Cabranes has asserted that “[i]t is unlikely . . . that a judicial rejection of the doctrine of territorial incorporation would have much practical effect on the lives of most Puerto Ricans. . . . Without further action by the political branches of the federal government . . . Puerto Ricans still would have no vote either in Congress or in the electoral college.” Cabranes, *Puerto Rico*, *supra* note 97, at 463. Cabranes contends that the psychological implications would be more significant: “An authoritative rejection of the jurisprudence of the *Insular Cases* would boost the morale and enhance the credibility of the growing statehood movement by signaling that the people of Puerto Rico are constitutionally no different from, and thus not inferior to, their fellow citizens of the mainland.” *Id.* Most Puerto Rican leaders acknowledge that “‘incorporation’ of a territory is (as it was for Alaska and Hawaii) a waystation or a point of no return on the road to statehood.” *Id.* at 464.

³⁷² *Igartúa III*, 417 F.3d at 159 (Torruella, J., dissenting)

³⁷³ Eric K. Yamamoto & Chris Iijima, *The Colonizer’s Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES (2000), <http://www.colorlines.com/article.php?ID=75>.

V. ENDURING COLLECTIVE MEMORY

Judge Torruella challenged the racialized images inscribed in and reproduced through law that continue to foster systemic, present-day exclusion of the Puerto Rican people. But Judge Torruella did not explicitly say why many policymakers and members of the public accept the exclusion of Puerto Ricans as legitimate—in other words, *why* that exclusion, to them, seems natural and proper. As alluded to earlier, collective memory and racialization are analytical concepts that provide illumination.

By comparing *Plessy* to the *Insular Cases* in denying discrete minority rights, Judge Torruella implied that the modern-day treatment of Puerto Ricans as second-class citizens entailed the racialization of Puerto Ricans as unworthy. As one scholar similarly has contended, “the racial mixture of blacks and Spaniards and the racism of the conquering United States played a profound role in determining the ultimate status of Puerto Ricans at every stage of the United States’ relationship with the island.”³⁷⁴ Judge Torruella also illuminated *Plessy*’s rationale that African Americans were racialized as inferior in order to justify harsh results. Indeed, *Plessy* was about controlling African Americans by treating them as subordinate and denying them full rights.³⁷⁵ Hawai‘i’s experience was similar: the sugar planters racialized Puerto Ricans as inferior to legitimate harsh treatment and to exert social control. Whereas the racialization of Puerto Ricans occurring at a national level at that time supported explicit political decisions about whether to incorporate Puerto Rico and its people into the United States, Hawai‘i’s racialization centered on social control for planters’ economic gain once Puerto Ricans were in the United States. This need for exacting control was rooted deeply in the relationship between the Hawai‘i sugar planters and Washington, D.C., as Hawai‘i’s sugar planters exerted direct influence over the growth of U.S. agribusiness and enmeshed their

³⁷⁴ Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 156.

³⁷⁵ See *Plessy v. Ferguson*, 163 U.S. 537, 538–39 (1896) (ruling that the East Louisiana railway could legally prevent Homer Plessy, who was seven-eighths Caucasian and one-eighth African, from riding a railway car reserved for white passengers, and, in doing so, sanctioned the exclusion of Blacks from nearly every facet of public life); see also Derrick A. Bell, Jr., *Brown v. Board of Education: Forty-Five Years After the Fact*, 26 OHIO N.U. L. REV. 171, 172 (2000) (asserting that *Plessy v. Ferguson* gave legal legitimacy to “racial segregation . . . a policy intended to give governmental support to the domination of Negroes by whites”); Derrick A. Bell, Jr., *California’s Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 LOY. L.A. L. REV. 1447, 1450–51 (1997) (contending that *Plessy* legitimized “the widespread practice of racially segregating blacks in virtually every aspect of public life”); see also Torruella, *Hacia Dónde Vas*, *supra* note 101, at 1511 n.49 (“[The *Insular Cases*] stand at a par with *Plessy v. Ferguson* in permitting disparate treatment by the government of a discrete group of citizens” (citation omitted)).

goals with political interests in Washington, enabling U.S. militarization and imperialism in the Pacific. After agitating for the annexation of Hawai'i to the United States, and after Hawai'i became a U.S. territory, the plantation owners needed to control recalcitrant workers that were shipped to Hawai'i in substantial numbers. They did so in part by racializing the laborers as inferior and incapable of self-government.

This is why the racialization that occurred in Hawai'i is an important foundation for today's treatment of Puerto Ricans. Hawai'i's sugar barons and territorial government depicted Puerto Rican laborers as "thriftless," "treacherous," "ignorant," and "weak." And as described above, at the turn of the twentieth century, the deployment of these images served to dominate, restrict, and exclude. This early racialization in Hawai'i, combined with the racialization of Puerto Ricans across the nation, generated a collective memory of Puerto Ricans as uncivilized and unworthy of full participation in the U.S. polity. And these enduring damaging racial characterizations of Puerto Rican people, and their political consequences, are what spurred Judge Torruella's dissent.

Indeed, this long-developed collective memory of Puerto Ricans is carried forth today at a deep subconscious level and shapes today's understandings of past injustice and the need for redress for the Puerto Rican people. For example, during the congressional debates in the 1990s regarding Puerto Rico's political status, some members resurrected those collective memories to argue for the exclusion of Puerto Ricans from the polity. One Senator "reportedly stated that Puerto Ricans might not 'blend' with the United States if they choose statehood."³⁷⁶ Others "took occasion to say [they were] not sure Puerto Ricans belong in American society."³⁷⁷ Indeed, as Román has written, "[w]hile in the early 1900s the nativistic disdain of congressional leaders for the people of Puerto Rico was more explicit, that same disdain, albeit thinly veiled, was apparent in Congress almost a century later."³⁷⁸ That long-held disdain, he maintains, "continue[s] to threaten the process that may lead to freedom and full acceptance for the people of Puerto Rico."³⁷⁹

In 1999, in the public dialogue over the release of Puerto Rican political prisoners, Puerto Ricans were depicted as "'unpatriotic' and 'ungrate-

³⁷⁶ Roman, *Alien-Citizen Paradox*, *supra* note 15, at 29.

³⁷⁷ *Id.* (quoting 137 CONG. REC. 3962 (1991) (statement of Senator Moynihan chastising other Senators for their "shameful display of nativism")).

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 32.

ful.”³⁸⁰ As Pedro Malavet asserts, political repression of independence activists “required a reconstruction of Puerto Ricans as ungrateful and possibly even dangerous” while “the policy emphasis . . . changed from one of cultural indoctrination to one of political control and, sometimes, repression.”³⁸¹ Soon thereafter, amidst the overwhelming Puerto Rican opposition to the continued U.S. Navy bombing of Vieques, Puerto Rico, familiar characterizations of Puerto Ricans as “foreigners” resurfaced. As Román observed, when President George W. Bush announced that the U.S. would halt military exercises in Vieques in 2003, he described the nearly four million U.S. citizens residing in Puerto Rico not as “U.S. citizens” or “our own people,” but as “our friends and neighbors [who] don’t want us there.”³⁸² More recently, during the confirmation hearings of Supreme Court Justice Sonia Sotomayor, she was called the “daughter of Puerto Rican immigrants,” again invoking the perpetual foreigner stereotype.³⁸³

³⁸⁰ Malavet, *Cultural Nation*, *supra* note 13, at 52.

³⁸¹ *Id.* at 70; see also Ediberto Román, *Who Exactly is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 61–62 (2000) [hereinafter Román, *La Vida Loca*] (asserting that the national debate surrounding President Clinton’s clemency offer for fourteen Puerto Rican independent “terrorists” focused on “the danger to ‘true’ Americans” and treated the U.S. citizen inhabitants of Puerto Rico as foreigners).

³⁸² Ediberto Román, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformed Benefits*, 13 BERKELEY LA RAZA L.J. 369, 377–78 (2002) [hereinafter Román, *Reparations and the Colonial Dilemma*]. Pedro Malavet similarly contends that the United States uses these social constructions to reinforce its legal construction of Puerto Ricans as second-class citizens. For him, the United States socially constructs “Puerto Ricans in the United States as greedy immigrants and Puerto Ricans in Puerto Rico as ungrateful foreigners. . . . [and] legally constructs Puerto Ricans as second-class citizens, by giving them statutory United States citizenship.” Malavet, *Cultural Nation*, *supra* note 13, at 52. Malavet maintains that “[t]he traditional narrative about Puerto Rico in the United States posits that the Puerto Rican isleños/os ‘have the best of both worlds’ because ‘they’ do not pay federal taxes and nonetheless get federal benefits.” Malavet, *Reparations Theory*, *supra* note 87, at 410.

³⁸³ See Andy Sullivan, *Battle Takes Shape Over U.S. Court Pick Sotomayor*, REUTERS, May 27, 2009, <http://www.reuters.com/article/idUSTRE54P2IS20090527>; Tom LoBianco, *Sotomayor Battled Bias in D.C.*, WASH. TIMES, May 26, 2009, at A01, available at <http://washingtontimes.com/news/2009/may/26/obama-pick-faced-discrimination-law-student/>; see also NAT’L ASS’N OF HISPANIC JOURNALISTS, *NAHJ: Avoid Confusion on Sotomayor*, May 26, 2009, <http://www.nahj.org/2009/05/nahj-avoid-confusion-on-sotomayor/> (“Her Puerto Rican parents are not immigrants, as some journalists have reported, since island-born residents are U.S. citizens, conferred by an act of Congress in 1917. People who move to the U.S. mainland from Puerto Rico are no more immigrants than those who move from Nebraska to New York.”); Román, *Reparations and the Colonial Dilemma*, *supra* note 382, at 378 (describing incidents where prominent United States members of Congress of Puerto Rican descent were treated as foreigners in the United States); Ray Suarez, *Puerto Rico Democracy Act*, HUFF. POST, May 24, 2010, http://www.huffingtonpost.com/ray-suarez/puerto-rico-democracy-act_b_587300.html

The easy resurrection of these damning stereotypical images is relevant.³⁸⁴ As Juan Perea maintains, the legacy of racism underlying the United States' conquests "lives on in the subordinate commonwealth status of Puerto Rico, whose citizens continue to lack representation and voice in our national affairs."³⁸⁵ Ediberto Román similarly posits that "the U.S. obsession with remaining white and English-speaking justified the United States' failure to fully accept the people acquired as a result of [its] imperialistic expansion. . . . This century-old problem explains why the Puerto Rican people are part of America yet lack the rights of other U.S. citizens"³⁸⁶—and particularly the right to vote for U.S. president.

VI. CONCLUSION

This article uncovers one story of racialization that shaped the modern-day collective memory of Puerto Ricans. That story—from thousands of miles away in Hawai'i—sheds light on the politics underlying the legal blockade of the Puerto Rican franchise. The combined racialization, deployed by U.S. decision makers to bolster the American conquest of Puerto Rico and then spread by American agribusiness and Hawai'i's government to destabilize and dehumanize individuals as a means of social control, operated to keep Puerto Ricans at the polity's margins in both Hawai'i and Puerto Rico. This early racialization generated a "collective memory" of Puerto Ricans as inferior, undeserving, and ineligible for political partici-

(describing Americans' overwhelming lack of knowledge of Puerto Ricans' immigration status, history, and culture).

³⁸⁴ Mainstream media and pop culture also reproduce characterizations of Puerto Ricans as "outsider," "foreigner" and "other." These characterizations deeply influence society's vision of Latinas and Latinos, and, in turn, have legal and political consequences. See Román, *La Vida Loca*, *supra* note 381, at 40, 59 ("The foreigner or outsider label marginalizes Latinas and Latinos to such an extent that they become invisible in the American political landscape."); see also Rebecca Tsosie, *Introduction: Symposium on Cultural Sovereignty*, 34 ARIZ. ST. L.J. 1, 13 (2002) ("The stories told by non-Indians about Indians through film and literature, for example, structure the dominant society's view about Native nations, and are used to justify the dispossession of Native resources, both tangible and intangible, for the benefit of the larger society.").

³⁸⁵ Perea, *Fulfilling Manifest Destiny*, *supra* note 15, at 162 (maintaining that "[m]ajoritarian racism, expressed through neutral-sounding treaty language and federal legislation, supported by the Supreme Court, sought to justify the perpetuation of such unequal treatment").

³⁸⁶ Román, *Alien-Citizen Paradox*, *supra* note 15, at 33; see also Malavet, *The Story of Downes v. Bidwell*, *supra* note 14, at 146 (asserting that the *Downes* doctrine today affects the daily lives of Puerto Ricans, who are still second-class citizens); Rivera Ramos, *Legal Construction of American Colonialism*, *supra* note 14, at 328 (while the *Insular Cases* are only one part of a larger whole, "they constitute a very important and dramatic example of the series of legal events that have contributed to shape the colonial experience of the Puerto Rican nation throughout this century").

pation. That memory was inscribed in and reproduced through law and media to reinforce present-day exclusion. That group memory, in part, bears on present-day Puerto Rican justice claims and responses to them.

Modern-day injustices remain rooted in those characterizations. Even with United States citizenship for Puerto Ricans, they cannot vote in presidential elections and have no voting representation in Congress. Indeed, “[a]fter a hundred years the situation has suffered little change: no established political status, absolutely no liberty or rights, except supposedly at the sufferance of the Congress[.]”³⁸⁷

The experience of Puerto Ricans in Hawai‘i also illuminates an important theoretical development: the “collective memory” of injustice. As the *Igartúa-de la Rosa* decision illustrates, the question of Puerto Ricans’ right to vote with all of its related legal claims is really a threshold struggle over the “collective memory” of how Puerto Rico was “acquired” by the United States, the ensuing treatment of Puerto Ricans both in Hawai‘i and nationwide, and the kind of derogatory racialization that justified those actions. These theoretical insights have broader relevance for groups in the United States struggling against colonization and the damaging racial characterizations sustaining it, including Native Hawaiians,³⁸⁸ Chamorus of Guam and other territorial peoples,³⁸⁹ Native Americans,³⁹⁰ African Americans,³⁹¹ Asian Americans,³⁹² and other Latinos/as.³⁹³ And it has relevance for groups struggling against colonization worldwide.³⁹⁴

³⁸⁷ Trias Monge, *Plenary Power*, *supra* note 14, at 17.

³⁸⁸ See Yamamoto & Betts, *supra* note 24, at 557–62.

³⁸⁹ Julian Aguon, *Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, 31 U. HAW. L. REV. 113, 152–53 (2008) (contending that if the Chamoru people win the “threshold struggle over collective memory” in their efforts to assert human rights claims in domestic courts, it will “arm the[m] with a valuable resource in the fight for self-determination”).

³⁹⁰ Rebecca Tsosie, *Native Nations and Museums: Developing an Institutional Framework for Cultural Sovereignty*, 45 TULSA L. REV. 3, 19 (2009) (asserting that, as part of expressing Native American “cultural sovereignty,” Native and other museums can play a part in transforming the “collective memory” of historic trauma, such as Native American genocide, by facilitating “a broader sharing of stories, between and among groups”).

³⁹¹ See Yamamoto, Serrano & Rodriguez, *supra* note 56, at 1295 (“[African American reparations] lawsuits—in conjunction with political organizing and community education—are . . . bringing to the public fore issues of history, collective memory, psychological healing, and institutional reordering”); Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2127 (2005) (contending that the “scope of injustice” in the reopened Emmett Till case “is now defined not by the parameters of the original legal proceedings, but by what historical memory tells us happened in 1955 and in the five decades since then”).

³⁹² See Robert S. Chang, *Closing Essay: Developing a Collective Memory to Imagine a Better Future*, 49 UCLA L. REV. 1601, 1606–07 (2002) (asserting that the collective memory of

Public trials and their accompanying court decisions are thus particular sites for the framing of the collective memory of injustice. Communities and groups can use these sites to challenge the dominant memory—often with transformative benefits.³⁹⁵ As Yamamoto asserts, “How a community frames past events and connects them to current conditions often determines the power of justice claims or of opposition to them.”³⁹⁶ Today’s narrow legal arguments for redress can gain traction only if the fight over the collective memory of injustice is won first. Indeed, “the power to claim one’s history, rather than have it retold by an outsider looking in, is increasingly important to community self-definition, an integral component of the human rights principle of self-determination.”³⁹⁷

Asian Americans as foreign, which justified Asian exclusion, “can be called on to remind us of what can happen when our nation fails to live up to those principles embedded in the U.S. Constitution.”).

³⁹³ See Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 167 (2005) (contending that the violence and anti-Mexican sentiment in Southern California in 1943 “remain an important part of the collective memory of the Mexican American community” and serve as “a reminder of the outsider status of persons of Mexican ancestry in the United States”).

³⁹⁴ See Hom & Yamamoto, *supra* note 23, at 1758–60 (describing collective memory in the contexts of the investigation of the atrocities in the Balkans; the Japanese American internment and redress; the Filipino human rights litigation for torture and murder during the Marcos regime; and the struggles for Native Hawaiian self-determination).

³⁹⁵ Román, *Reparations and the Colonial Dilemma*, *supra* note 382, at 383 (asserting that Puerto Ricans’ counterstories should be told within and beyond the judicial arena, including before legislatures and in the media). Román also encourages Puerto Rican storytelling in collaboration with the peoples of other U.S. colonies, including Guam, the U.S. Virgin Islands, American Samoa, and others. *Id.* at 384. See also generally ROMÁN, OTHER AMERICAN COLONIES, *supra* note 14 (examining the historical and modern-day links between the millions of territorial peoples colonized by the United States).

³⁹⁶ Hom & Yamamoto, *supra* note 23, at 1771.

³⁹⁷ Yamamoto & Betts, *supra* note 24, at 564–65.

